Government of Canada
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The Criminal Law in Canadian Society

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PREFACE

This document sets out the policy of the Government of Canada with respect to the purpose and principles of the criminal law. As such, it is unique in Canadian history. Never before has the Government articulated such a comprehensive and fundamental statement concerning its view of the philosophical underpinnings of criminal law policy.

Canada's Criminal Code is nine decades old, and the common law on which it is based spans centuries. In recent years, the need to reflect upon the basic assumptions of our criminal law has become apparent. Growing crime, growing public concern about crime, growing public expenditures for criminal justice, and growing doubts about the ability of the criminal justice system to solve the problem have had the combined effect of convincing federal and provincial Ministers responsible for criminal justice of the need for a thorough review of Canadian criminal law in all its aspects.

As a result, the Department of Justice, in cooperation with the Ministry of the Solicitor General and in close consultation with the provinces, has embarked on the Criminal Law Review. This Review will begin with recommendations of the Law Reform Commission of Canada and will require detailed examination of all substantive and procedural aspects of Canadian criminal law.

The Criminal Law in Canadian Society, issued at the outset of this complex process, is aimed at providing a basic framework of principles within which these more specific issues of criminal law policy may be addressed, and assessed.

As Minister of Justice, I believe this statement offers the foundation for a credible and effective criminal law, reflecting the needs and values of Canadian society.

Honourable Jean Chrétien, P.C., M.P.
Minister of Justice

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EXECUTIVE SUMMARY

Part I

Outlines the background of the Criminal Law Review and identifies the aims of this paper, which are to:

1. Provide Canadians with a summary **outline of the context** in which criminal law policy should be viewed;
2. Articulate a **statement of the appropriate scope, purpose and principles of criminal law**, on the basis of a discussion of its basic nature and philosophical underpinnings; and
3. Give an **indication of the general implications** of endorsing the statement of scope, purpose and principles, in order to provide guidance for the more specific decisions that must be taken as the Review process evolves.

Part II

Analytically discusses crime trends, various explanations offered for the phenomenon of crime, and the policy response made to crime by governments over the past several decades.

The Canadian experience is seen as similar to that of most western democracies, with respect to:

- the vastly expanded scope of "criminal law", taken in its broad sense, that has accompanied growth in public sector involvement in the economic and social spheres;
- the large growth in crime, especially in the last two decades, as the post-war baby boom passed through adolescence into early adulthood;
- the dedication of increasingly large amounts of public sector resources to criminal justice system activities, especially police;
- the existence of conflicting pressures to further expand resources to offer protection on the one hand, and to tighten up or re-allocate resources in view of financial constraints and doubts about the efficacy of traditional justice system activities on the other hand;

- the trend to rely much less on imprisonment as the primary sanction for many forms of non-violent property crimes, while maintaining or increasing the severity of sentences for offenders involved in crimes of violence;
- the propensity of the Canadian justice system to respond to crime by a greater overall use of imprisonment compared to the justice systems of many similar countries; and
- the growing recognition of the interrelatedness of the criminal law and the various components that constitute the criminal justice system, combined with continued or increased sensitivity to issues of intergovernmental jurisdiction.

Many of these factors will continue to influence the general shape of future events.

Part III

Identifies seven major concerns that encompass the wide range of specific criticisms, problems and complaints with respect to criminal law and the criminal justice system. These concerns involve:

1. The **effectiveness of the criminal law** in combatting crime and correcting offenders;
2. Enhancing the **effectiveness of preventive measures and alternative measures** less coercive and intrusive than the criminal law;
3. The proper **role of the victim** in the criminal law, and the victim's needs and treatment in the criminal justice system;
4. The **balance** between powers granted to criminal justice agents and the rights and liberties of individuals;
5. **Accountability** in the exercise of discretion and in the use of public resources to achieve objectives;
6. **Sentencing and post-sentencing** processes; and
7. The **proper scope** of the criminal law, the **proper purpose** of the criminal law, and the **distinctions** that should be made between the criminal law and other types of law or social measures.

Part IV

Addresses the underlying question of the proper scope, purpose and objectives of the criminal law, by distinguishing four subsidiary issues:

1. With respect to the **purpose of the criminal law**, the paper concludes that:
   - the criminal law and the criminal justice system must pursue two major sets of purposes — "justice" and "security";

- criminal sanctions, whether justified in terms of utilitarian or retributive aims, are primarily punitive in nature, and are understood as such both by society and by those on whom they are imposed;
- acceptance of retributive justifications for punishment implies neither rejection of utilitarian justifications for punishment, nor the acceptance of harsh, cruel or vindictive forms or levels of punishment. Indeed, the retributive approach acts as a brake, in setting a maximum permissible limit on punishment that might otherwise be subject to no such limit in its pursuit of various utilitarian goals such as deterrence, incapacitation, or even rehabilitation. This distinguishes the concept of retribution from that of vengeance; and
- the necessity of pursuing these twin, and sometimes-conflicting, purposes requires an approach to be developed for defining the proper point of balance.

2. With respect to the **proper scope** of criminal law, the paper concludes that:
   - it makes sense to distinguish between the criminal law and other forms of social control;
   - the major criterion for determining what conduct merits response from the criminal law is whether the conduct causes or threatens serious harm to individuals or society; and
   - any such "criteria" are in reality only guidelines, because their necessarily general level of abstraction always leaves room for interpretation, and because the judgment of Parliament on what conduct is to be treated as criminal cannot be bound by anything other than constitutional limits.
3. With respect to the concepts of **responsibility and blame**, the paper concludes that:
   - it is vital to retain a standard of responsibility and fault in the criminal law because of the impact of the criminal process and criminal sanctions;
   - it is important to define clearly the standard of responsibility required by each criminal offence; and
   - it is not desirable to confine the criminal law to acts committed by individuals against other individuals; rather, it is advisable to provide for the liability of organizations, and individuals acting within organizations, where serious harm to an individual or to the general good is caused or threatened.
4. With respect to the limits on the **powers and sanctions** of criminal law, the paper concludes that:
   - the principles of justice, necessity and economy should be considered in determining the means that may legitimately be employed by the criminal law and the criminal justice system to effect its ends;

- justice may require the criminal law to respond to some conduct — anything less would be inappropriate;
- the substantive and procedural limiting principles well known to criminal law act as restraints on the extent to which the law and the system may legitimately pursue the "security" objectives;
- it is unjust to go beyond the minimum intervention necessary for an adequate and appropriate response to be made to criminal conduct — from both a utilitarian and a retributive perspective; and
- the tension that results between the justice and security objectives requires the criminal law to strike a delicate balance.

In summary, the criminal law has the positive objectives of contributing to the promotion of a just, peaceful and safe society: "justice" and "security" objectives. Its role in pursuing the "security" objectives is limited by application of the principles of justice, necessity and economy — principles which reflect the concept of criminal law as society's ultimate recourse along the spectrum of informal and formal means for influencing and responding to conduct. These principles restrict the appropriate scope of the criminal law to conduct which is culpable, seriously harmful, and generally conceived of as deserving of punishment. They restrict the appropriate form and amount of powers and sanctions by virtue of well-recognized legal rights, largely of a procedural nature; and by the presumption against any intrusion into individual rights and freedoms, unless a burden of proof can be discharged by the state which demonstrates on reasonable factual grounds that such intrusion is necessary. Furthermore, the intrusion must not exceed the minimum necessary and adequate in the circumstances.

STATEMENT OF PURPOSE AND PRINCIPLES

Recognizing that:

In the Charter of Rights and Freedoms, Canada has guaranteed certain rights and freedoms consonant with the rule of law and with principles of justice fundamental to a free and democratic society;

Canada has, in addition, undertaken international obligations to maintain certain standards with respect to its criminal justice system;

The criminal law is necessary for the protection of the public and the establishment and maintenance of social order;

The criminal law potentially involves many of the most serious forms of interference by the state with individual rights and freedoms; and

Criminal law policy should be based on a clear appreciation of the fundamental purpose and principles of criminal law;

It is appropriate to set forth a statement of purpose and principles for the criminal law in Canada.

Purpose of the Criminal Law

The purpose of the criminal law is to contribute to the maintenance of a just, peaceful and safe society through the establishment of a system of prohibitions, sanctions and procedures to deal fairly and appropriately with culpable conduct that causes or threatens serious harm to individuals or society.

Principles to be Applied in Achieving this Purpose

The purpose of the criminal law should be achieved through means consonant with the rights set forth in the Canadian Charter of Rights and Freedoms, and in accordance with the following principles:

(a) the criminal law should be employed to deal only with that conduct for which other means of social control are inadequate or inappropriate, and in a manner which interferes with individual rights and freedoms only to the extent necessary for the attainment of its purpose;

(b) the criminal law should clearly and accessibly set forth:

(i) the nature of conduct declared criminal;

(ii) the responsibility required to be proven for a finding of criminal liability;

(c) the criminal law should also clearly and accessibly set forth the rights of persons whose liberty is put directly at risk through the criminal law process;

(d) unless otherwise provided by Parliament, the burden of proving every material element of a crime should be on the prosecution, which burden should not be discharged by anything less than proof beyond a reasonable doubt;

(e) the criminal law should provide and clearly define powers necessary to facilitate the conduct of criminal investigations and the arrest and detention of offenders, without unreasonably or arbitrarily interfering with individual rights and freedoms;

(f) the criminal law should provide sanctions for criminal conduct that are related to the gravity of the offence and the degree of responsibility of the offender, and that reflect the need for protection of the public against further offences by the offender and for adequate deterrence against similar offences by others;

(g) wherever possible and appropriate, the criminal law and the criminal justice system should also promote and provide for:

(i) opportunities for the reconciliation of the victim, community, and offender;

(ii) redress or recompense for the harm done to the victim of the offence;

(iii) opportunities aimed at the personal reformation of the offender and his reintegration into the community;

(h) persons found guilty of similar offences should receive similar sentences where the relevant circumstances are similar;

(i) in awarding sentences, preference should be given to the least restrictive alternative adequate and appropriate in the circumstances;

(j) in order to ensure equality of treatment and accountability, discretion at critical points of the criminal justice process should be governed by appropriate controls;

(k) any person alleging illegal or improper treatment by an official of the criminal justice system should have ready access to a fair investigative and remedial procedure;

(l) wherever possible and appropriate, opportunities should be provided for lay participation in the criminal justice process and the determination of community interests.

Part V

Explains some of the implications of the proposed statement of objectives and principles, taking each of the elements of the statement in turn. The specific recommendation of the Law Reform Commission of Canada that a clear distinction be drawn between "real" crimes and other offences is endorsed in principle in the policy statement. The need is identified, in this context, to direct attention to a number of issues not explicitly addressed by the Law Reform Commission, in order to achieve the most effective and appropriate distinction in light of concerns about practical matters of administration, enforcement, and statutory location. Since approximately 300 federal statutes create offences, only a small proportion of which would be seen as "real" crimes, the implementation of this recommendation will have to be undertaken on an incremental and long-term basis, primarily through consideration by individual departments of the particular statutes they administer.

Part VI

Summarizes and concludes the paper by reiterating the importance of employing the concept of restraint in addressing the specific criminal law issues to be addressed over the next several years by the Criminal Law Review. The ability to conclude the overall process with a criminal law that is credible, effective and reflective of the interests and values of Canadians requires the understanding and support of the public at large. For this reason, comment and reaction to the concepts put forward in this paper is invited.

I. INTRODUCTION

Should family disputes, often involving violence or threats, be dealt with through criminal charges, or through attempts to reconcile the parties through social service agencies? Should so-called "victimless" or "consensual" offences such as drug abuse, prostitution, gambling, or pornography be crimes? Should the criminal process be invoked in cases of minor property offences where the offender is willing and able to make restitution? Should a corporation be treated as criminal for ignoring its obligation to protect the environment by repeatedly paying regulatory fines? Should "plea-bargaining" be encouraged, tolerated, or forbidden? Should laws be passed to exempt police and other peace officers from some laws in certain circumstances?

Parliament and the public will be asked to consider issues such as these over the next several years, as the fundamental review of Canadian criminal law proceeds. The issues raised above are only examples, and demonstrate the need for the Review to address basic questions concerning the very nature of the criminal law in Canadian society. These more basic questions require us to reflect on:

- the purpose and principles of the criminal law;
- the proper scope of the criminal law;
- issues of responsibility and fault; and
- issues concerning the lengths to which the criminal law can legitimately go in pursuit of its objectives.

This paper is the first major statement from the federal government on these questions.

1. Background of the Criminal Law Review

The Criminal Code of Canada was approved by Parliament in 1892. Since then, the Code and other federal criminal legislation have been the subject of an almost continuous process of piecemeal and patchwork amendment.

In the past few years, the combined effect of a number of factors convinced governments that priority had to be given to the complex job of overhauling Canadian criminal law. Canada, like other Western post-industrialized nations, has experienced in the past two decades a continued growth in traditional "street" crime, growing public concern about the apparent breakdown in social controls

(especially as shown in rising violent crime), the emergence of new forms of sophisticated white collar and organized crime, escalating costs for the criminal justice system and growing doubts about its effectiveness, recurring problems in prisons and penitentiaries, and intensified debates about the proper point of balance between civil liberties and individual rights on the one hand, and powers granted to criminal justice agents to prevent and detect crime on the other hand.

In this climate, doubts came increasingly to be raised, not only about specific aspects of the statutes or the criminal justice system, but also about the basic assumptions and orientation of the criminal law as a whole.

While these doubts have been brought into sharper focus in the past decade, they represent the culmination of many years of commissions, inquiries and committees which have examined various elements of the Canadian system of justice since Confederation.

Indeed, for at least the past five decades, the Code has been the subject of criticism. The Archambault Report of 1938 cited with apparent approval a resolution passed by the Canadian Bar Association complaining that:

> Since 1892, the Code has been amended year after year, here and there, something added to one section, something taken from another, with many entirely new sections and even new statutes of a criminal nature added. One is reminded of an ancient edifice to which additions have been made, planned by many architects and carried out with little regard to the appearance of the completed structure. The so-called revision of 1906 was a consolidation rather than a revision. We therefore recommend that representations be made to the Minister of Justice urging upon him the necessity of a complete revision . . .

In 1947, the Criminal Law Section of the Commissioners on the Uniformity of Legislation resolved "that a commission be appointed to undertake a complete recodification of the criminal law and a revision of the Criminal Code and ancillary statutes."

Such a Commission was in fact appointed in 1949, and the fruits of its labours were incorporated in the recodified Criminal Code of 1955. The Commission's mandate, however, was limited to consideration of the organization and form of the Code, rather than its substance.

By 1969, the Report of the Canadian Committee on Corrections (Ouimet Report) felt it necessary to recommend "that the Government of Canada establish in the near future a Committee or Royal Commission to examine the substantive criminal law."

The source of this recommendation was the Committee's conviction that "such a comprehensive examination of the Criminal Code and related Canadian statutes and that body of 'quasi-criminal' law enacted by the provinces is a matter of the greatest urgency." This examination was thought to be necessary for a number of reasons, including the belief that "unenforceable legislation is harmful since it teaches disrespect for the law"; the existence of "considerable evidence to suggest that in prohibiting certain kinds of conduct and imposing criminal sanctions upon its occurrence, one may be providing the most effective and corrupting publicity for the practice rather than the prohibition"; the present availability of "adequate knowledge of glaring deficiencies in the existing system"; and the conviction that "terms commonly employed to designate crimes do not adequately describe particular kinds of activity" — a failure that may limit "the educative function of the criminal process."

In 1970, Parliament responded by enacting legislation establishing the Law Reform Commission of Canada, whose mandate ranged from "the removal of anachronisms and anomalies in the law", to "the development of new approaches to and new concepts of the law in keeping with and responsive to the changing needs of modern Canadian society and of individual members of that society." The Minister of Justice of the day made the suggestion that "the Commission should have a complete re-writing of the criminal law as one of its first projects", in light of his view that "the Criminal Code of Canada . . . is in need of thorough housekeeping, thorough revision not merely in the lawyer's law as it applies to the Criminal Code, but also in many of the Code's social aspects."

The Commission's first Research Program (March 1972) noted that "at present there is confusion and controversy about the functions of the criminal law. Thus, the Commission will study on a continuing basis the purposes to be served by the criminal law in Canadian society. . . . Ultimately, a concise statement of aims and purposes may be formulated for incorporation within the introductory sections of a remodelled Code."

Over the past nine years, the Commission has published eight formal reports, eighteen working papers and a host of studies with respect to various aspects of substantive law and criminal procedure. Some of this work related to specific and fairly technical matters (contempt of court, miscellaneous procedural amendments), while other elements were concerned with basic questions of philosophy and principle (scope of the criminal law, guidelines for dispositions and sentences, imprisonment and release).

This major initiative in law reform paralleled efforts undertaken in other countries — the United States, France, West Germany, and, to a lesser extent, Great Britain and Australia — to reform and revamp criminal law in a comprehensive way.

And just as complaints about unnecessary complications, inaccessible language, anachronistic provisions, and technical complexities informed all those exercises, so too did concerns of a more general nature about the credibility, legitimacy, and effectiveness of the law, and about the very purposes and objectives pursued by the law.

These latter concerns led the Parliamentary Subcommittee on the Penitentiary System in Canada (1977) to conclude that the criminal justice system

> lacks any clear or acceptable governing conception of what we as a society intend to accomplish under the rubric of 'criminality' . . . and we can only achieve justice, in a rational sense of that very significant term, through a major commitment to fundamental reform. . . . Reform of our prisons should be no more than one part of a thorough, open and necessarily painful candid assessment of **what the criminal justice system ought to do.** (original emphasis)

Shortly after the Subcommittee Report was tabled in the House of Commons, the then Chairman of the Law Reform Commission, in a speech to the Canadian Congress of Criminology and Corrections, urged "the Parliament of Canada to declare a moratorium on all new legislative programmes and their associated administrative support systems that involve criminal law reform, except in the area of court procedure and of evidence." This moratorium should be undertaken because of the absence of one fundamental thing: "a comprehensive justice policy". Such a lack, the Chairman continued, "is not just an idiosyncrasy of the present government — no government in Canada or the occidental world, to the best of my knowledge, has ever sat down and reviewed where we have been in the area of criminal justice, evaluated the experience and then developed programmes designed to make future experience conform to known, articulated future goals."

2. The Criminal Law Review

In response to this train of events, some twenty federal and provincial Ministers responsible for the various aspects of the criminal justice system in Canada met in Ottawa and unanimously agreed in October, 1979,

> that a thorough review of the Criminal Code should be undertaken as a matter of priority. The principle of federal-provincial cooperation was firmly established and it was agreed that the review should encompass both substantive criminal law and criminal procedures.

As a result of that agreement, a detailed proposal was developed by the federal and provincial governments to launch an accelerated review aimed at expediting the enactment of a modern, responsive and effective Canadian criminal law.

Beginning with recommendations from the Law Reform Commission, the federal government — in cooperation with the provinces — will systematically examine all aspects of Canadian criminal law. By the end of 1985, the Law Reform Commission is scheduled to complete work on more than fifty individual projects addressing the substantive and procedural aspects of the law. The government will analyze these findings and present proposals to Parliament in logically-connected policy groupings, to enable the coordinated and timely implementation of the Review process.

3. Aim of this Paper

As the first formal substantive statement by the federal government with respect to the Criminal Law Review, this paper is intended to accomplish three major goals:

a) to give Canadians a summary outline of the context in which criminal law policy should be viewed;

b) to articulate a statement of the appropriate scope, purpose and principles of criminal law, on the basis of a discussion of its basic nature and philosophical underpinnings; and

c) to give an indication of the general implications of endorsing the statement of scope, purpose and principles, in order to provide guidance for the more specific decisions that must be taken as the Review process evolves.

In approaching this task, the paper adopts a sharper and deeper focus as it progresses. A fundamental reappraisal requires consideration of a broad range of questions. If criminal law is understood to be one possible response to those social problems that manifest themselves in the form of criminal behaviour, then one must begin with a general discussion of crime in society. Having set that context, the focus can then be sharpened to isolate the current problems posed by crime for Canadian communities and the Canadian criminal justice system. Finally, the focus of the paper will be sharpened further to concentrate on the ways criminal law itself can respond to these problems.

The focus of this paper is progressively sharpened in this manner because, although the criminal law is only one component of the many necessary responses to crime, it is the response of the criminal law that is the subject of the Review of which this paper forms a part. It is only after the question of the nature and purpose of criminal law has been answered that the Review can consider the host of specific questions it must address in the coming months and years.

Criminal law and criminal law policy are matters of interest not only to victims, judges, lawyers, police, corrections workers, and criminals, but also to all Canadians. This paper is seen as a means both of informing the public as to the issues and principles involved, and of providing a framework for discussion of those issues and principles as the Criminal Law Review proceeds.

It is only through widespread public support and understanding that the criminal law will adequately respond to our needs and reflect our values as Canadians. It is hoped that this paper, issued at the beginning of a long and difficult process of examination, will assist in realizing those aims.

II. THE CONTEXT

The purpose of this Part of the paper is to give an overview of Canadian criminal law and the system that has grown up around it, within the context of an evolving Canada and a changing world. Such an overview should assist one in gaining a better appreciation of the kinds of challenges with which we are presently faced, and consequently in assessing the advisability of adopting various proposals aimed at meeting those challenges through criminal law policy.

To this end, this Part attempts to describe, in an analytical way, a number of the principal factors and trends that have a significant impact on both the current Canadian situation and future possibilities. Taking this global approach should allow our present problems to be viewed in perspective, by directing attention to the key principles and themes in Canadian criminal law over the years.

Ask most people whether "crime" has grown in recent years and they would reply yes, that it has jumped significantly. And in a way they would be right. Ask most people if more than 10% of all crimes in Canada involve violence and they would reply yes, most definitely. And they would be wrong. The next two sections present some figures concerning crime and the public's perception of crime in Canadian society.

1. The Incidence of Crime

The Ouimet Report (1969), after entering the mandatory cautions concerning the dangers of relying on questionable — and often nonexistent — official statistics, referred to the fact that the rate of total convictions for all offences grew by an astonishing 2500% in Canada between 1901 and 1965. But the Report hastened to point out that 98% of this total increase took the form of summary convictions — for less serious crimes — rather than convictions for indictable offences, and, further, that 90% of the 98% was accounted for by traffic offences. Therefore, "what these overall conviction figures attest to mainly, then, is not an upsurge in violent or predatory crime but a phenomenal increase in the use — and consequently misuse — of motor vehicles."

An examination of the trend with respect to convictions for indictable offences — generally the more serious crimes — showed an increase from 165 per 100,000

population in 1901 to 615 in 1966, an increase the Ouimet Committee speculated was due in large measure to major social and economic changes such as increased urbanization and industrialization.

The Ouimet Report also found that the conviction rate for indictable offences was quite stable between 1950 and 1966, with increases largely accounted for by increases in the proportion of young persons in the population.

Also, within the "indictable" category, crimes against property greatly outnumbered crimes against the person (violent crimes), and the comparative violent crime conviction rate in Canada was significantly lower than that in the United States. On this basis, noted the Report:

> The tentative conclusion to be drawn . . . is that Canada has not been experiencing a marked increase in serious crime. The dramatic increase in this century in the convictions for all offences taken collectively has been largely an increase in convictions for minor offences related to the growing use of the automobile. A slight increase in the total rate of indictable convictions in the period since 1950 has been the result of an increase in the rates of young men and of women of all ages, which has offset a steady decline in the rates of men beyond their mid-twenties. When the distribution of offenders among various categories of "serious", i.e. indictable, offences was examined it was found that non-violent property offences, as distinct from violent offences directed against persons, continue to predominate.
>
> These findings underline the danger of attaching much significance to reports of annual fluctuations in unfamiliar statistics or of extrapolating to the Canadian situation the much-publicized trends of crime in large United States cities. Many of the circumstances cited as causes of the apparently rising United States crime rates are either absent or much less severe in Canada.

During the period 1966-1980, however, the rate of crime in both the violent and non-violent categories has grown significantly — a fact that requires re-examination of the analysis contained in the Ouimet Report.

The first comment made in Ouimet's chapter on crime (concerning the lack of reliable information) is, if anything, more applicable today. There are no data on convictions since 1973. One must rely on reports made to police — reported crime, not convictions. And the reliability of these data has been questioned. Fortunately, federal and provincial Ministers responsible for criminal justice have taken steps to remedy this situation, through the establishment of the Canadian Centre for Justice Statistics, but this organization was only set up in mid-1981, and is not likely to have conviction data before 1984.

On the basis of all offences (federal, provincial and municipal) reported to police, however, it appears that total offences have grown by 71% between 1970 and

1980, from a total of 1,574,145 to a total of 2,692,159 (excluding traffic offences, but including summary offences, offences under provincial and municipal law, and under federal legislation other than the Criminal Code). The rate of all offences reported to the police per 100,000 population has gone up 52%, showing that some of the overall growth in reported offences is attributable to growth in the Canadian population.

The proportion of Criminal Code offences in the total of offences reported to police has changed from 70% in 1970 to 76% in 1980 — a fact that reflects growth in almost all categories of crime in this period, except for provincial offences and municipal by-law offences. (The latter, in any event, are not "crimes" in the constitutional sense — a point to be discussed later).

A closer examination of the Criminal Code offences reported to police shows significant growth in both property and violent crime reported, whether expressed in absolute numbers or in rates of reported crime per 100,000 Canadians. More detailed figures relating to specific offences appear to indicate a steady growth in most property crimes throughout this ten-year period. Rates of reported violent crimes are not so consistent, and the growth in certain violent crimes, such as robbery and wounding, seems to have levelled off from 1975 to 1980, following a period of significant increases from 1970 to 1975. The murder rate has actually dropped since 1975.

In comparison with the United States, the rate of property crimes has grown at a somewhat faster pace in Canada. For some offences, the per capita rates in both countries are now quite similar. In the case of crimes of violence, however, the reverse is true, and the difference between the two countries has grown greater. In 1979, for example, there were 4.7 crimes of violence in the United States for every one such crime in Canada (after taking into account the larger U.S. population).

It must be stressed that these figures reflect reports to police, and do not take into account the fact that there is a progressive "attrition" of cases throughout the system. That is, only a portion of offences "reported to police" result in a charge actually being laid against someone, and fewer still actually result in a conviction. Also, statistics of crimes reported to the police are considered of questionable validity. The increase in offences could be at least partly attributable to increases in police manpower, better record-keeping, and use of more effective policing and communications techniques. On the other hand, victimization surveys suggest that a sizable proportion of some crimes go unreported to police.

Despite all these qualifications, it is clear that there has been a large increase in crime over the century, and especially in the past two decades, although recent years indicate a slowing down of the rate of increase in some of the most troubling crimes. Further information is presented in Appendix "B".

2. Perceptions of Crime

The figures in the preceding section represent the best information available on the extent of crime, problematic though that information is. It would appear, however, that the general public perceives the extent of crime as being much worse than, in fact, it is. Most people are familiar with the results of opinion surveys showing that a large majority of the public supports the use of harsh sanctions or believes that the courts are too lenient. Fewer people are familiar with critiques of those surveys which suggest that the results ought not to be too heavily relied upon.

One source of criticism is that, in forcing respondents to choose between two or three possible answers to a simply-phrased question, an artificial and misleading sense of certainty is injected into the results. Thus, if people are asked whether they do or do not favour the death penalty, one set of responses is received. If, however, more detailed, complex and specific questions are posed, the apparent level of support for capital punishment is reduced significantly. Secondly, crime and criminal justice appear to rank as major concerns in some surveys that ask people to respond to a list of possible concerns on which "crime" appears as a category. If, on the other hand, people are simply asked to name their chief concerns — with no hints from a list presented to them — crime or criminal justice are very rarely volunteered as an answer.

Thus, the responses to surveys are, in some measure, determined by the way in which questions are posed. For this reason, attitudinal surveys about these complex and emotional issues should be interpreted cautiously.

Near the beginning of the Criminal Law Review, a survey was commissioned to explore the perceptions of Canadians about crime. This survey was unique in Canada, in focusing on perceptions about the actual state of crime and workings of the criminal justice system, as distinct from more common questions about people's attitudes or opinions about what should be done. The subjects on which answers were sought had some "objective", statistical reference point (bearing in mind the difficulties of a statistical nature mentioned above and in Appendix "B"). In February, 1982, more than 2000 adult Canadians were asked a series of questions about the extent of violent crime, and sentencing and conditional release practices in Canada. The results indicated that, generally, Canadians vastly over-estimate the proportion of crime which involves violence, believe murders have increased since Parliament abolished the death penalty (when they have in fact declined), and think people released on parole are far more likely than in fact they are to commit violent crimes soon after release.

In short, the image Canadians have of crime is a violent one — far more violent than statistics indicate is the case. In fact, only six to eight percent of all reported crime is violent. The "average" Canadian believes that the situation is seven times

as serious, that more than half of all crime is violent. Two-thirds of Canadians believe murders have increased since 1976, when in fact they have declined, whether measured in terms of numbers of incidents, numbers of victims, or rates. Four in five Canadians believe many inmates commit crimes of violence shortly after release on parole, with the average response overestimating the actual situation by a factor of five. Similarly, the average response indicated that people believe the courts send far fewer convicted persons to prison than they in fact do, especially for violent crimes such as robbery.

As is the case with all surveys, these results must not be over-interpreted. People may understand the specific questions in different ways, and the "objective" or "actual" statistics to which reference was made in analyzing the results are subject to the qualifications and cautions referred to above. Also, the relationships between apparent perceptions of crime, and fear of crime, or attitudes toward crime and criminal justice are not well understood. It goes without saying that those tragic or horrible individual crimes which are the subject of widespread and justifiable public concern, require continued concentration on preventing such incidents and protecting the public from such individuals.

For all these cautions, however, it does seem apparent that perceptions of crime influence expectations of the criminal law and the criminal justice system. It is not known if those perceptions stem from reliance upon media reports that concentrate on the more spectacular, violent crime, or the influence of American television programs or crime statistics. But it does seem clear that efforts should be made to offer Canadians a more realistic picture of the problems we face. If a better understanding is achieved of the actual state of the phenomenon of crime, then a more effective, responsive and practical approach can be developed to adapting the criminal law to the complexity and reality of the situation.

3. In Search of an Explanation

Theories about the causes of crime go as far back as history itself. Explanations have taken many forms, concentrating on physiological, biological, psychological, sociological, historical, political, economic or ideological theories, depending on the focus of the inquiry, the perspective of the theorist, and the intellectual fashion of the era. Some of these theories now appear silly, others sensible, but, to date, none of them has been proven universally valid and all of them have given rise to almost unending debate.

In the nineteenth century, for example, crime was attributed to the existence of a "criminal class" in society. Later, explicit links were drawn between crime and underlying social and economic factors such as poverty, ignorance, unemployment and lack of opportunity.

During the early decades of this century, concentration on psychological explanations for crime developed in parallel with this broader sociological approach. The suggestion was made that crimes were committed by individuals who were aberrant or maladjusted in not developing the kinds of inner controls and checks required to make social life possible. Early psychological and psychiatric work had led to growing confidence in the ability of humans to understand, and therefore to change and control, the sources of their attitudes and behaviour. In criminology, this led to a strong movement to revolutionize the nature of criminal punishment by injecting into the system programs and personnel whose mission was to apply this growing body of human science knowledge to criminals with a view to transforming them into productive citizens. In later decades, there was a growth in programs of social services and community intervention (such as finding jobs for offenders) in recognition of the realities of the social environment in which the criminal behaviour arose.

These two streams of theory, the psychological and the sociological, did not necessarily conflict, since it was possible to work toward lessening the societal causes of crime, while at the same time working with individual offenders, without waiting for the overall change in societal conditions to occur.

In the face of experience during these decades, however, it became necessary to offer more complex theories. The general lot of the individual in society, by most traditional measures, progressively improved over the decades. A more elaborate social welfare network was put in place to assist those who, for one reason or another, did not derive the benefits from overall economic expansion that the majority received. And yet, crime continued to grow, and even accelerate, especially since the 1960s — a period of unprecedented plenty in most western industrialized democracies. Forensic psychology failed to make the giant strides that its early enthusiasts had hoped for, and found many of its clients to be less "mad" than "bad".

Theorists began to turn their attention to the vast expansion of opportunity and incentive for crime (through such factors as urban planning and building design, and the increased emphasis on, and availability of, mass-produced consumer goods), the related idea of relative deprivation (whereby mass advertising contributes to the feeling of comparative, if not absolute, poverty among some elements of the population), general notions of alienation and anomie (where sectors of the population — the young, the poor, minorities, and even a disaffected "middle class" — feel increasingly depersonalized and at odds with the basic values of the society in which they live), and media role modelling (where violence and other things are learned or legitimized through the media).

Others pointed to even more basic demographic factors: the proportion of "crime prone" youth in the total population as a result of the post-war baby boom; the increase in the number of homes left unprotected during the day as a

result of the increasing number of women in the work force; dramatic shifts in population in search of employment opportunities to large urban centres and the consequent pressure on local resources and patterns of life; the increasing rate of family breakdown; the almost universal presence of television in Canadian homes.

Since the 1970s, economists have entered the debate, suggesting that, far from being an irrational or aberrant response to societal norms, much crime was in fact a perfectly rational economic strategy. For those who desired certain goods, services, or status, but who were unable or unwilling to acquire them by traditional means, acquiring them through crime quite simply made sense. The risks of detection and apprehension were real, but relatively low, and, for some, were far outweighed by the benefits to be gained through criminal activity. In this view, then, it was a mistake or a waste of energy to concentrate on "reforming" or "rehabilitating" criminals (or at least those criminals who committed the bulk of crime — crime against property for gain). Instead, it was argued, attention should be devoted to increasing the element of risk involved, by protecting property more adequately and by concentrating on steps to increase the likelihood of detection, apprehension, and conviction of criminals.

Other social scientists focused research on specific, policy-related issues, concentrating on the operations and effects of the criminal justice system itself, rather than on broad demographic, sociological and psychological factors.

These more recent trends in theories of crime causation have resulted from a number of factors. First, there has been a shift in perception about the possibility of altering the "root" causes many still associate with crime. It may be agreed that poverty, ignorance, unemployment, and discrimination must continue to be attacked, and that the influence of the proportion of young people in the population, as well as the importance given to the family, school, friends, and moral beliefs, must have a crucial and perhaps determinant effect on behaviour and attitudes. But the current view within both government and the human sciences seems closer to that expressed by American scholar James Q. Wilson of Harvard:

> (if) we regard any crime-prevention or crime-reduction program as defective because it does not address the 'root causes' of crime, then we shall commit ourselves to futile acts that frustrate the citizen while they ignore the criminal.

In this view, the search for comprehensive causal theories about, and solutions for, crime constitutes "a way of deferring any action and criticizing any policy. It is a cast of mind that inevitably detracts attention from those few things that government can do reasonably well and draws attention toward those many things it cannot do at all."

Secondly, costs in the labour-intensive police and correctional fields have grown exponentially, although this growth was due more to inflation than to large improvements in services. Doubts have been increasingly expressed about the

efficacy of relying so heavily on government, and specifically the criminal justice system, to solve the problem. Pressures on resources and demands for accountability in terms of results have contributed to the more narrowly-focused attention on the system and its impact.

Finally, the results of new criminal justice research in the 1960s and 1970s have shown that little is known about how to prevent or stop crime by traditional methods of punishment or treatment.

A study carried out by the American National Academy of Sciences Panel on Deterrence and Incapacitation (1978) found that the relatively few studies that can be relied upon indicate that punishment does act as a deterrent for some people and for some crimes, but that no simple cause and effect relationship can be established. Others have examined the impact on crime rates of "incapacitating" the small minority of persistent or dangerous offenders thought to be responsible for a disproportionate amount of crime. The primary method of incapacitation is, of course, incarceration. Reliance on an imprisonment and incapacitation strategy to reduce crime, according to a growing body of research, would have only minor effects on the overall crime rate while causing an enormous increase in financial and social costs. As yet, other major and emerging schools of crime causation and prevention — such as defensible space, target hardening, and even intervention with and for the individual offender — are only now developing a systematic knowledge base.

This latter reference raises the question of rehabilitation. Over the past century, great stress has been laid on the importance of this concept. This has been largely based on humanitarian impulses and a utilitarian, "common sense" theory that the best way to prevent crime in the long run is to rehabilitate those who commit crime — by "transforming offenders into law-abiding citizens" (Archambault, 1938). But in the late 1960s, on the basis of a survey of attempts to evaluate rehabilitative or treatment programs, one criminologist concluded that these efforts had resulted in expensive failure — that "nothing works." Later analysis of these studies indicated that some programs do have a positive effect on some people. In general, however, most efforts have been undertaken in such a way as to preclude the possibility of making any definitive assessment of their effectiveness, or lack thereof. Again, after several decades of work, experts are really not in a position to say with any confidence whether specific policies do or do not have much effect. Many advocates, however, maintain that resources devoted to this approach have simply been inadequate for a fair trial.

Perhaps the major conclusion that has been drawn from this emerging body of research and evaluation about crime, criminals and society is that not very much can be concluded. This is partly because of the understandable focus of much of that research, until recently, on the development of comprehensive causal theories. Even if it were possible to develop such theories, it would not necessarily assist one in determining what to do about crime. This call for relevance has

influenced the recent trend to focus more closely on policy-relevant variables that might give some better indication of what can be done; and the efforts over the past decade in government and universities to undertake such research and evaluation will no doubt assist in that endeavour.

4. The Response to Crime

This section traces the pattern of official (i.e. governmental) responses to crime through a policy framework consisting of law, institutions, and resources. Appendix "A" describes the unique constitutional division of responsibilities in the area of justice. Appendix "B" outlines the rapid growth of criminal justice system resources over the past several decades, and the manner in which that system deals with cases presented to it.

In speaking of the response through enactment of legislation, this section will refer to concerns more broadly-based than "crime", in the sense that the vast expansion of government over the past century has led to legislative action in a wide variety of fields. The historical fact is that much or most of that legislative activity has, consciously or unconsciously, taken the form of an expansion in the scope of criminal law — with that phrase being understood in a broad sense.

In the early decades after Confederation, governments at both the federal and provincial levels paid comparatively little attention to crime. The federal Parliament enacted the Criminal Code and other legislation having penal aspects, and maintained and expanded the penitentiary system. The provinces, for their part, established or oversaw the establishment of police, courts, prisons and local jails, as a consequence of their responsibility for the administration of justice. But compared to recent years, the level of government resources devoted to criminal justice was minor.

The scope of activities was also limited because, with the exception of the power to define offences specifically in legislation, the federal government was largely content to continue the traditional common law approach to criminal law policy. Under this tradition, the major role in determining overall principles and their proper application was that of the judiciary, not the executive or the legislature. In enacting the 1892 Code, and subsequent revisions up to and including that of the early 1950s, successive government spokespersons were careful to stress their understanding of, and support for, this allocation of responsibilities.

As the system expanded and the workload increased, as public attention focused more insistently upon the responsibility of government for solving major social problems, governments came increasingly to play a more activist role in justice policy.

Where criminal law debates in the House of Commons in early years concentrated primarily on technical legal questions, the emphasis in the last three decades has increasingly been to recognize the interrelatedness of legal policy and social policy.

In addition, the scope of the law itself expanded as governments became involved in more areas of social and economic activity throughout this century. Many would be surprised by the estimate made by the Law Reform Commission, that Canadians are subject to a substantial number of criminal offences in addition to the approximately 350 offences found specifically in the Criminal Code — "20,000 federal offences, and 20,000 in provincial law, not to mention the welter of municipal law".

To be sure, the overwhelming bulk of these offences is found in regulations made under the authority of federal and provincial statutes, rather than in the statutes themselves. And some may argue that, at the very least, the 20,000 provincial offences and all municipal offences are not, in the technical sense, criminal, since the constitution gives sole jurisdiction to the federal Parliament to enact truly "criminal law". Most of the federal offences are not really "criminal" either, since they deal with other subjects that are the justifiable constitutional concern of the federal Parliament, such as banking, shipping, income tax, customs and excise, interprovincial trade, immigration, and so on.

But the fact that citizens found guilty of almost all these offences are liable to punishment — including imprisonment — makes their characterization as criminal law sound more reasonable than it might at first seem. In other words, even though most of the conduct being sanctioned might not be thought of as "criminal" in the usual sense, the sanctions available for dealing with breaches are thought of as "criminal" punishments.

A major factor explaining this development is the traditional legislative practice of providing for the enforcement of the offence by almost-automatic reference to the summary conviction procedures contained in the Criminal Code. Thus, breach of most federal statutes creating offences (and there are some 300 such statutes) carries a potential penalty of six months in jail, a $500 fine, or both, and requires appearance in the ordinary criminal courts. Other statutes refine this, some creating indictable offences (even more criminal-like in nature), others adjusting the penalties, but almost all carrying the possibility of imprisonment.

Other noticeable trends seem related to this growth in the scope of the law. The last two decades have seen a rapid expansion of resources in the justice field, and a more activist leadership role played by federal and provincial governments alike in introducing new programs of treatment and law reform. In addition, there is a perceived breakdown, or at least reduction, in the ability of traditional social institutions such as the family, the neighbourhood, the church, and the school to effect a basic social consensus about acceptable limits and standards of behaviour. This breakdown led to increased pressure on government to fill the vacuum, to

stake out a more central role in "controlling" society through formal structures such as the criminal justice system. Increased national and international attention in the post-World War II years to individual rights, and the development of formal legal structures to articulate and enforce those rights have accelerated this trend.

These sometimes-conflicting pressures continue to be felt, with some people calling on governments to step up efforts to combat crime through the enactment of new legislation or expenditure of more resources, and others insisting on enhanced government efforts to protect human rights against attacks by other individuals or components of society, and by government (and the criminal justice system) itself.

Appendix "B" gives an indication of the manner in which the criminal justice system deals with crime through the processing of cases, and compares the Canadian experience with that of some other countries.

On the basis of the material presented in the Appendices and in this section, as well as through reference to the many other legal, historical and sociological studies concerning various aspects of the criminal law and the criminal justice system, the Canadian experience over the past century can be seen to be in the mainstream of most western democracies, with respect to:

- the vastly expanded scope of "criminal law", taken in its broad sense, which has accompanied growth in public sector involvement in the economic and social spheres;

- the large growth in crime, especially in the last two decades, as the post-war baby boom passed through adolescence into early adulthood;

- the dedication of large and growing amounts of public sector resources to criminal justice system activities, especially police;

- the existence of conflicting pressures to further expand resources to offer protection on the one hand, and to tighten up or re-allocate resources in view of financial constraints and doubts about the efficacy of traditional justice system activities on the other hand;

- the trend to rely much less on imprisonment as the primary sanction for many forms of non-violent property crimes, while maintaining or increasing the severity of sentences for offenders involved in crimes of violence;

- the propensity of the Canadian justice system to respond to crime by greater overall use of imprisonment in comparison with the justice systems of many similar countries; and

- the growing recognition of the interrelatedness of the criminal law and the various components that constitute the criminal justice system, combined with continued or increased sensitivity to issues of intergovernmental jurisdiction.

5. Future Policy: Pressures and Trends

While it is always a perilous business to predict, it does seem likely that many of the factors that contributed to our current situation will continue to influence the general shape of future events.

Justice issues traditionally attract widespread public interest and attention, often of a politically and socially polarizing nature. Thus, one element of the population may react to perceived increases in criminality by calling for much tougher policies on the part of the criminal justice system. At the same time, other elements question both the effectiveness of criminal justice system action and the moral justification for such intervention, calling instead for increased formal protection for individual rights as well as a greater degree of openness and accountability on the part of public institutions in general and criminal justice agencies in particular.

Despite the relative decline in the proportion of the population thought to be most "crime prone" as the baby boom passes into middle age and beyond, most experts predict a continued growth in "traditional" or "street" crime, if at a continually declining rate of growth. It should be noted that much violent "street" crime in reality occurs in the home, between people well known to each other, rather than in the form of the anonymous violent attacks by strangers which seem to be the major image of such crime.

In addition, the social and economic evolution of society over the past several decades has resulted in the emergence of new, sophisticated and potentially harmful forms of activities born of technological advances that may call for a criminal law response.

The predicted continuation of slow economic growth, unemployment, and inflation may contribute to this projected continued increase in crime, as well as to the development of new forms of crime.

The increased use of technology in the economy, and in all aspects of society, will have implications for criminal law and the criminal justice system. On the positive side, reduced reliance on cash will lessen opportunities for cash theft. Use of new computerized information and communications technology will provide police with better investigative tools, and individuals with preventive and protective devices in their homes and businesses. At the same time, however, new avenues will open up

for white collar crimes involving manipulation of this new technology, as well as for possible intrusions into privacy rights of individuals both by criminals and by public and private sector agencies.

Continued influence on the economy by large national and trans-national enterprises and organizations, and the consequent increased risk to the public posed by the large-scale intentional or unintentional harmful effects of the activities of such organizations, will require more attention to be devoted to ways in which society, through law, can control and limit such risks.

The trend of recent years to shift away from neighbourhoods and public places to increasingly enclosed, isolated and self-contained private complexes (in the form of shopping malls, condominiums, total institutional environments) has resulted in a rapid expansion of the private security industry, a development that raises issues concerning rights, property, accountability and access. At the same time, the erosion of private and shared space in other urban areas has led to the growth in what some writers call crime generated by environmental design.

Growing attention to the needs of crime victims is already leading to heightened emphasis on services addressing those needs, and to renewed consideration of the appropriate role and rights of the victim within the criminal justice system — a system that primarily considers crimes to be affronts to the peace generally, to society as a whole, rather than focusing on the impact of crime on individual victims.

Pressures on resources in a climate of fiscal restraint will bear heavily on criminal justice agencies, which are especially labour-intensive in nature and therefore especially difficult areas in which to effect reductions. These pressures to cut back will likely run squarely up against anticipated public demands for higher levels of protection by state agencies against crime. On the other hand, increasing doubts about the effectiveness of traditional criminal justice institutions, programs, and policies have led many to advocate the use of more innovative and cost effective approaches that limit the degree of state intervention through more restricted use of costly imprisonment as a sanction, and increased reliance on community-based, victim-oriented restitutive and reparative sanctions, and on crime prevention technologies.

One likely side effect of this trend will be a still higher proportion of difficult, dangerous and violent inmates in penal institutions, with the accompanying social, psychological and financial costs implied by that development for inmate, staff and society alike. As for rehabilitative programs, the doubts cast on their efficacy by some recent research has already led to a shift in emphasis or rationale. Instead of suggesting that such programs can be imposed on unwilling

subjects "for their own good", it is recognized that non-voluntary rehabilitation is simply not possible. The benefits of changing attitudes and behaviour — for both the offender and society — are still very real, however, and for this reason, as well as for reasons of simple humanity, correctional authorities must provide programs presenting both opportunities and incentives for offenders to reform themselves.

Finally, no discussion of any public policy issue in Canada would be complete without mention of federal-provincial issues of jurisdiction. Appendix "A" describes the complex sharing of responsibilities for the various components of the criminal justice system, and the increasing degree of consultation and cooperation that has developed in the past two decades in recognition of the interrelatedness of that system. While the extent of cooperation is significant, it would be inaccurate to suggest that there are no frictions or disagreements. Indeed, a number of issues of common concern within the system involve differing views on how the responsibilities for programs and financing should be divided. Continued pressures on resources may result in an increased level of interjurisdictional conflict unless care is taken to ensure that attention is directed to productive ways of maximizing effectiveness and minimizing conflict.

III. CURRENT PROBLEMS AND CONCERNS

This Part is designed to crystallize some of the main criticisms of the law and the system, by describing the major problems perceived to have accompanied, or grown out of, the factors outlined in the previous Part.

Reference to newspaper articles and learned journals, public comments by elected representatives or spokespersons for particular groups, and correspondence from the general public reveals a host of specific problems, concerns, and complaints about criminal justice in Canada. A list of such perceived concerns would include a range of subjects, such as:

- concerns about specific crimes or justice system decisions seen as particularly outrageous or unfair;
- controversies about particular, and usually spectacular, negative incidents such as prison riots, escapes, hostage takings or allegations about official misconduct;
- delays in trials, backlogs in courts, numbers of persons in jail awaiting trial;
- concerns about the propriety of certain aspects of criminal justice, such as the practice of plea bargaining, certain police investigative procedures, and parole;
- concerns about sexual bias in the criminal law and alleged discrimination in its administration;
- alleged inability of the system to deal effectively with crime because of undue concern for the rights of accused;
- the role of and treatment accorded to victims of crime; and
- increasing costs of the system with no evidence of improved effectiveness in solving the problems of crime.

These concerns, each important in itself, would seem to be related to more general issues, at the level of the system as a whole.

1. How effective is the criminal law in combatting crime and correcting offenders?

Reference was made earlier to controversy over whether the criminal law or justice system has much effect in controlling crime and protecting the public. These doubts have led many criminal justice professionals to state the goals of the system in a more modest way than was the case just a decade ago. It is now generally agreed that the system cannot realistically be expected to eliminate or even significantly reduce crime and rehabilitate unwilling offenders — but only to reduce or mitigate the social costs of crime, to punish offenders, and to create programs, opportunities and incentives for treatment or other help for offenders. According to this view, it is not the penalties on the statute books, nor even the severity of prison sentences handed down by the courts that are the most effective criminal justice system responses to crime; instead it is improvements in preventive, investigative and prosecutorial methods and in court procedures that offer the best hope for improvement by increasing the certainty of detection, apprehension, conviction and punishment.

These points are especially important in view of the fact that criminal justice expenditures have continued to grow virtually every year and in every sector, and it is becoming increasingly important to know how to be more effective with the same or lower levels of resources.

Within this context, general concern about criminal justice effectiveness has been more specifically focused on serious, especially violent, forms of crime, and on certain new and emerging forms of crime which are not among the traditional targets of criminal investigation.

Concern about effectiveness therefore relates to the question of whether the criminal law should be broadened to encompass new offences, or old offences committed with new technology, as well as to the question of whether the interventions, decisions and programs of the criminal justice process are effective and can be made more effective.

2. How effective are preventive and alternative measures?

The general view is that the criminal law and the criminal justice system are, and ought to be, the ultimate tools available to society in dealing with the anti-social conduct of citizens. A continuum of measures and institutions exists for dealing with human interactions in society, ranging from the informal or internal moral and cultural norms and beliefs, traditions and expectations we share, to various formal institutions such as the family, the school, the church, professional organizations, positive incentive governmental programs, mediation and conciliation, the civil law, regulatory schemes and, only at the end of the spectrum, the criminal law.

Because it embodies the coercive force of the state, and because it is the final recourse open to the state and society for responding to anti-social conduct, use of the criminal law ought to be reserved only for those cases where other, less intrusive and coercive methods have either shown themselves to be inadequate or are patently inappropriate for dealing with the type of conduct in question.

Some see the tendency to resort to the criminal law as a more or less automatic response, or because of perceived shortcomings with other sorts of formal or informal societal institutions, as a regrettable trend that should not only be resisted, but reversed. In this view, imagination, dedication, and innovation should be employed in the effort to resolve societal problems through means other than the criminal justice system, thus enhancing the latter's credibility and effectiveness.

Included among alternative means are programs directed toward the prevention of crime. Some argue that too many of the state's resources and crime policies are directed, not towards the "front end" where crime is generated, but only later when individual criminals are apprehended. This policy, or lack of policy, is said to ignore a large sector of the possible measures that can be taken in dealing with crime as a social problem. Governments, for their part, are increasingly heard to say that crime is a community responsibility, and "we can't do it all". Current thinking about preventive programs suggests that emphasis should be placed on:

- standards of environmental design and urban planning that would reduce opportunities for crime generated by residential and commercial design, materials and technology, and neighbourhood planning and community structure;
- better public education, especially about such things as drug abuse, abuse of alcohol, and the improper use of motor vehicles;
- amending certain regulatory statutes and procedures to increase the security of the technology or system being regulated, decrease the crime-generating capacity of the system (such as through "crime impact assessments" for certain programs), and decrease the susceptibility of the system to misuse and fraudulent use; and
- more specialized training of regulatory and law enforcement personnel in the detection and handling of complex or sophisticated forms of social harm, and better research on effective sanctions against these offenders.

3. How can the system be more responsive to victims?

It is increasingly said that the victim is the "forgotten" person in the criminal justice process. The immediate emotional, financial and physical needs victims experience in the wake of crime are often not addressed. Victims are usually given

little or no information about the process they are entering when they report a crime or participate in an investigation or prosecution. Such participation, especially for victim-witnesses, can involve repeated court appearances, loss of wages, difficulties with transportation and child care during participation, and, in cases of confused and insensitive treatment, a loss of faith in and respect for the justice system.

To the victim, it may at times appear that the criminal justice system is overly concerned about "solemn ritual" and the punishment of the offender, and insufficiently concerned with the victim's financial losses and needs. A homeowner whose yard is damaged by vandals may have little interest in seeing the vandals punished, but a great deal of interest in recovering the cost of the damages. Yet the criminal justice system has not seen itself as the appropriate institution to deal with these concerns. While no reliable figures are available, it is believed that compensation to the victim by the offender is ordered by the court under current law in only a minority of cases. The compensation awards available in most provinces to victims of violent crime must be sought through an administrative process totally separate from the criminal trial. Civil suit is the only other avenue open to most victims.

Some critics of this state of affairs argue that the criminal and civil law systems have been allowed to grow too distinct from one another, and that an effort should be made to align the two systems more closely, as is the case in some Western European countries. The benefits of such an alignment, it is suggested, would be a more convenient, understandable and effective system of justice from the viewpoint of the individual citizen, and a re-focusing of the system on positive aims such as reparation and reconciliation, rather than on negative aims such as blame allocation and punishment.

On the other side, important arguments are heard for resisting a thoroughgoing merger of the civil and criminal systems. One practical argument is that the criminal courts would become hopelessly clogged with cases smacking more of civil debt enforcement or individual vengeance than criminal justice. Many courts and prosecutors have also been reluctant to permit citizen dispute mediation programs to operate in their jurisdictions, and concerns have been expressed about involving criminal courts in the complex and time-consuming business of assessing damages.

Despite these issues and concerns, the needs of victims have begun to be recognized as a more valid interest in the criminal justice process. In 1981, an International Conference on Victim Assistance, held in Toronto, focused national attention on the victim issue. In December, 1981, federal and provincial Ministers agreed "to intensify their present efforts in the victim assistance areas by taking immediate steps to stimulate and improve information and support services." All provincial governments and the federal Justice and Solicitor General's departments have agreed, through a Task Force, to survey the extent of victim services. In addition,

the Task Force will study the needs of victims, identify resources and approaches showing particular promise, and examine important issues of principle and practice. The Task Force is due to report back to Ministers in December, 1982.

4. How should the powers of the state be balanced with the rights and liberties of individuals?

A wide range of contentious issues is grouped under this general heading. There are those who argue on the one hand that police powers are too limited, that courts are powerless to prevent pretrial releases of serious offenders, that trial procedures are cumbersome, over-exacting and biased towards the rights of the accused, as against the interests of the victim and society. On the other hand, there are those who argue that the state's powers are already too strong, not subject to effective review or other forms of accountability, and unguided by statutory direction or public policy. In this connection, implementation of the principles and rights enshrined in the Canadian Charter of Rights and Freedoms is of special importance. Certain aspects of the law may require amendment to comply with the Charter, and examination of both substantive and procedural components of the existing law has already begun. In addition, it will be a continuing duty to scrutinize proposals for changes to the law in order to ensure compliance with the Charter. The chief anticipated impact of the Charter will likely not be felt at the level of statute law, however, but instead at the level of administrative actions by criminal justice agencies — actions that will likely be more subject to judicial scrutiny than in the past.

Specific areas under debate with respect to this overall issue include:

- **police powers**: These concerns encompass the issues of police effectiveness and individual liberties. The last ten years have seen particular attention focused on police powers through the various commissions of inquiry leading to increased public pressure to strengthen human rights guarantees in the face of police powers. On the other side, police have argued that there has been an erosion of their ability to combat effectively the large increases in crime over the last twenty years, and that effective public protection requires the granting of enhanced powers;
- **trial procedures**: Some argue that trials are too lengthy, too influenced by universally available legal aid, and too subject to technical procedural problems, court backlogs and delays to deliver the "swift, certain" justice which is seen as a prerequisite for effective deterrence. Others hasten to point out that full criminal trials are not the rule since most criminal prosecutions (an estimated 75-80%) are settled through a guilty plea, and that the right of the accused to a fair and full hearing must not be compromised in pursuit of more expeditious trial procedures;

- **pretrial release of defendants on bail or their own recognizance**: Police and others claim that too many defendants released prior to trial go on to commit other crimes, threaten witnesses, or illegally raise funds for their defence while they are free. Civil liberties groups have argued, on the contrary, that the initial progress made through the Bail Reform Act of 1972 has since been eroded through subsequent amendments which facilitate the requirement of money bail or surety, and permit the pretrial detention of large numbers of persons, many of whom, according to a recent study, ultimately do not receive prison sentences; and
- **rights accorded to convicted persons**: One view has it that convicted offenders have more rights than their victims or than law enforcement officials. Another view is that convicted offenders give up too many rights, are too much subject to additional penalties as a result of convictions (penalties such as criminal records and loss of employment opportunities), and, especially in the case of imprisoned offenders, do not have effective recourse to courts and other legal means of safeguarding their rights.

5. How can the justice system be made more accountable?

In Canada, considerable decision-making discretion is given, either by law or by tradition, to police, prosecutors, judges, correctional officials and parole boards. Discretion is generally viewed as a desirable and necessary tool for criminal justice agents, allowing them the degree of flexibility required to respond to the widely-varying cases with which they are faced.

Yet it is increasingly being recognized that certain unintended and undesirable consequences may arise from insufficient attention to the control of the exercise of discretion. For this reason, the problem of finding a proper balance between discretion and the rule of law has become an issue of concern. A number of commissions and studies arising out of controversial instances of the exercise of discretion in Canada have contributed to increased interest in the issue.

The concerns expressed about discretion are complex and interrelated. Most obvious among these is a concern over disparity in the exercise of discretion. By "disparity" is meant unexplainable or unjustified variation in the treatment of similar offenders in similar circumstances, caused by decisions made on the basis of unknown, indiscernible or indefensible considerations. Such disparity violates notions of fairness and even-handed justice.

From another perspective, concern about discretion stems from its lack of visibility and consequent resistance to public scrutiny and accountability. While the law requires accountability for certain important decisions, and the right of appeal provides another crucial means of legal accountability, little exists in the way of

formal policy criteria guiding the manner in which most criminal justice agencies use their discretion; and it is therefore not always clear why decisions are made. Furthermore, the agencies do not assess, and cannot draw real conclusions about, their operations and effectiveness.

In the context of the Review, the exercise of discretion and its control are issues that must be addressed. The criminal justice system must be accountable for its decisions and the effects of those decisions, as is any public agency. Indeed, it must be more accountable than most, because of the direct or potential impact of the criminal justice system on the rights and liberties of individuals. Accountability in all its dimensions — legal, financial, public and political — must therefore be a question specifically addressed in the criminal law.

6. How can sentencing and post-sentencing processes be improved?

The principles and law of sentencing are at the heart of the objectives of the criminal law. A century ago, Stephen observed that the imposition of sentence represents the climax of the criminal process. It is at the stage of sentencing that the criminal justice system most consciously and visibly expresses its denunciation of behaviour, attempts to deter or incapacitate people from further wrongdoing, or orders reparation or redress of the harm done.

The most significant concerns in sentencing can be grouped into three categories. First, there are no clear policies or principles of sentencing in Canada. Second, there is an apparent disparity in the sentences awarded for similar crimes committed by similar offenders in similar circumstances. Third, while little is really known about the effectiveness of various sentences, what is known suggests that the present sentencing options and practice leave considerable room for innovation and greater effectiveness. These three types of concerns are clearly interrelated, since the lack of clear policy on sentencing may both encourage disparity and reflect the lack of meaningful or clearly effective sentencing alternatives.

With respect to policies and principles, statutorily set maximum prison sentences for each Criminal Code offence are typically so much higher than the actual average sentence for the crime that they cannot be said to provide real guidance on sentencing.

The decisions on sentence by courts of appeal reveal a lack of uniformity in sentencing. General principles and procedural instructions abound, but there are few guidelines as to the manner in which general principles should govern the choice of sentence, or as to the weight which should be assigned to the different objectives or principles of sentencing. Furthermore, the Supreme Court of Canada does not hear sentencing appeals, reducing the possibility of a truly national approach.

Confusion in sentencing policy seems also to be connected to confusion surrounding the practice of laying charges and negotiating guilty pleas. Programs of post-sentence remission of and release from sentence have also led to debate, confusion and concern. The manner in which such processes as parole, remission, temporary absence and mandatory supervision affect sentence is not well understood by the public, and is periodically subject to criticism in the media and by criminal justice professionals who claim either that these processes operate too leniently, or that they should not be in use at all, because they needlessly expose the public to harm, usurp the court's sentencing authority and unduly lessen the effectiveness of the sentence.

All of these aspects of sentencing, concerning which there is no explicit policy, would contribute to concern about sentence disparities even in the absence of proof that there is such disparity. Though the quality of information on sentencing in Canada does not at present permit definitive conclusions, and there is disagreement as to the amount and type of sentence variation which is proper, the studies that have been done on sentencing disparity in Canada have resulted in concern. The Ouimet Committee referred to the "impression of disparity created by the present uneven application of the so-called tariff system of sentencing to imprisonment", and quoted Professor John Edwards as saying that "Canada displays a marked absence of uniformity in the principles of sentencing". In 1971, Professor John Hogarth found the sentences awarded by Ontario magistrates to be based more on individual tariff than on principles or factors in the case. The National Task Force on the Administration of Justice (1977-78) showed variation from province to province in the proportion of convictions which resulted in a sentence of imprisonment, and significant variation in the length of prison terms awarded. Further study of this question is required.

The third major concern relates to the effectiveness of sentences. There are some indications, from scattered and preliminary studies, that certain effects may result from certain sentencing practices. But there is virtually nothing known about the effects on a given offender of a given sentence, or its effects on the level of commission of that crime generally in the area. This "knowing that we don't know" has contributed to calls for restraint from the Law Reform Commission and others, especially concerning the use of those sanctions which impinge most directly on individual freedoms and dignity. But a great deal more needs to be learned about "what we don't know".

A particular problem in sentencing identified by the Ouimet Report and the Law Reform Commission is the lack of distinctions between dangerous and other offenders. In recent years, special provisions available in many countries, including Canada, for the indeterminate incarceration of "dangerous offenders" have come under fire on the basis of a recognition that no system of prediction has been able to forecast violent behaviour reliably.

Another difficulty in sentencing is a shortage of meaningful alternatives falling between the severe and potentially damaging effect of prison, and the sometimes minimal supervision and treatment available on probation.

In the context of the Criminal Law Review, the Law Reform Commission has already completed its work with respect to sentencing, and it remains for the government to suggest to Parliament the kinds of responses that might be made to the issues discussed above, and to the recommendations made by the Commission.

In preparation for this task, a number of activities are currently underway, in close cooperation with the judiciary and the provinces, in the form of judicial seminars, preparation of a sentencing handbook, and gathering and analysis of data. This work will enable the Criminal Law Review project on sentencing to build on the basis of better information.

7. What should the Criminal Law be about?

The last in this list of major concerns is, perhaps, the most important and provides the focus for much of the subsequent discussion in this paper. Uncertainty exists about the purpose the criminal law should serve, the types of conduct the criminal law should prohibit, and the ways in which the criminal law can and should be distinguished from civil, regulatory or administrative law.

On the one hand, many agree with the Law Reform Commission that the Criminal Code contains too many offences of an insufficiently serious nature, and that their inclusion in the Code ties up criminal courts needlessly, unduly stigmatizes individuals who do not deserve it, depreciates the value of the criminal law, and engenders disrespect for the law.

Others feel that the criminal law should apply to more anti-social behaviour than it does now, and that it should be invoked more often against wrongdoers. Some support the view, for example, that the criminal law should be used more energetically to reinforce certain values presently seen as threatened by such conduct as drug abuse, prostitution, gambling and obscenity. Others argue that the criminal law and justice system must be "modernized" to deal with new or emerging offences (such as sexual harassment or waste of energy resources), or with the seriously harmful consequences of some activities of large organizations. In this view, there is a place for the criminal law in some instances, because such activities violate emerging social values that acquire more importance as society becomes more complex and interdependent and its citizens thereby become more vulnerable to complex mischiefs such as pollution, misuse of information, monopolistic or collusive manipulation of prices and markets, theft by computer, destruction of scarce or non-renewable resources, manufacture of unsafe products, creation of unsafe working conditions, and so on.

Defining more clearly what should be included in the category of "crime" is only half the answer, since one of the additional sources of confusion about the boundaries of criminal law is the fact that there are no clearly distinguishing characteristics in terms of consequences. That is, both criminal law and non-criminal law cases, for the most part, are heard in the same courts, by the same judges, and with the same possible penalties. It likely makes no difference to the individuals in three neighbouring prison cells that one of them was convicted for a Criminal Code offence, the second for a Narcotic Control Act offence, and the third for an offence under a provincial statute. So attention must also be paid to the adequacy and clarity of the distinctions made between "real" criminal offences and other offences in terms of the consequences and procedures that attach to each.

In addition, the traditionally complex and cumbersome language in which statutes are drafted has been subject of criticism and complaint. The criminal law is a basic social document that should be comprehensible to citizens. The notion that citizens should have clear notice and fair warning of what conduct is prohibited requires that criminal law should be expressed in clear and simple language, consistent with the need for certainty, specificity, and completeness.

These issues will be discussed in the next Part of this paper, since an examination of underlying premises and assumptions is an essential first step to a thoughtful consideration of the many other issues and concerns that must be addressed during the course of the Criminal Law Review.

IV. SCOPE, PURPOSE AND PRINCIPLES

1. Introduction

It was noted earlier that many thoughtful observers of the recent scene sense a state of crisis about the criminal law: a crisis of legitimacy, of effectiveness, of accountability. Furthermore, many of these same observers ascribe the crisis to a lack of "any clear or acceptable governing conception of what we as a society intend to accomplish under the rubric of criminality . . ." (Parliamentary Subcommittee on Penitentiaries, 1977), to an "absence of any global concept or overall general policy which, if woven into the various elements of the criminal justice system, would serve to guide the various services with a uniform philosophy" (Quebec Commission of Enquiry into the Administration of Justice, 1969). The Parliamentary Subcommittee on Penitentiaries, in fact, found a "corrosive ambivalence" concerning the very goals and purposes of criminal justice.

The current debate concerning the proper purpose and scope of criminal law is of comparatively recent vintage, although it entails renewed examination of issues of moral and political philosophy that have been argued since before the Golden Age of ancient Greece.

In addressing this basic issue of the nature of the criminal law — an issue critical to the approach that will be adopted to a host of more specific issues of criminal law and criminal justice policy — it seems useful to distinguish a set of interlinked subsidiary questions:

a) What is and what ought to be the basic purpose of criminal law sanctions: punishment or treatment? And why does criminal law impose sanctions: because it is right to do so or because it works to do so?

b) What conduct should be subject to criminal law sanctions: what is the proper scope of the criminal law?

c) On whom is it justifiable to impose sanctions: only on those who intend harm, or also on those who cause harm without intending it?

d) How far can we go in pursuit of our aims through use of criminal law powers and sanctions?

Answers to these questions will lead to the formulation of a general statement of the appropriate scope, purpose and principles of the criminal law.

2. The Nature of Criminal Law

a) Purpose of the Criminal Law

The basic problem confronting criminal law and the criminal justice system, it is often argued, is not the variety of specific concerns and complaints about particular phenomena — which are mere symptoms — but rather a debilitating confusion at the most basic possible level, concerning what the criminal law ought to be doing.

Part II of this paper traced the swing of the pendulum in the past century away from the so-called retributive orientation of criminal law and toward a utilitarian approach.

In this view, as has been seen, the retributive approach was identified with an anachronistic, backward-looking, punishment-oriented concern with the wrong that had been done. The utilitarian approach, on the other hand, was seen as a modern, forward-looking, non-punishment oriented concern with protecting society by preventing future wrongs — either through changing factors in the environment or the individual offender through rehabilitation, or through the deterrent or simple incapacitative effects of imposing penalties.

This trend in the philosophical justification of criminal law was very strongly felt over the past 100 to 150 years, and it is only in the past decade that the pendulum has reversed itself, in placing more emphasis on criminal law punishment for the sake of justice, to ensure appropriate denunciation for the wrong that has been committed.

In large part, this swing has come about because of growing doubts about and dissatisfaction with the efficacy of the utilitarian approach, as well as perceived loosening of moral bonds in society that has resulted in an allegedly undisciplined and unacceptably lax response to destructive anti-social behaviour.

The call to clarify goals and to resolve an ambiguity in objectives is an understandable one, given the confusion about aims and results, and the growing demand for demonstrated effectiveness in the use of taxpayers' money.

As discussed in the second Part of this paper, the combination of growing crime, growing public concern, and growing criminal justice resources has furthered the swing to control and protection. This trend was accompanied and reinforced by the optimistic belief that we had at hand the tools of individual treatment and social engineering that would permit realization of those goals, allowing us at the same time to lessen our reliance on primitive techniques that came increasingly to be identified with an old-fashioned retributive philosophy.

The recent recession of that optimism, and the recent renewed emphasis on both traditional "justice" and "equity" concerns in general, and on the legitimacy of a

retributive justification for punishment in particular, has defined the terms of the current debate over fundamental criminal law objectives.

Posing the debate in these terms can be a useful means of sharpening understanding of the issues at stake. Many have argued that the utilitarian interest of society in eliminating crime requires that "punishment" and retributive measures (seen as nothing more than vengeance), be replaced with a range of carefully-calibrated tools designed to deter and rehabilitate. Some recent observers argue the opposite case: that the utilitarian efforts of criminal justice have not only failed to protect society and rehabilitate offenders, they have also led us to lose sight of the legitimate interest of society in seeing justice done. On this basis, the justice objectives should not only be revived, they should be given paramount emphasis, with any utilitarian effects on safety or crime reduction being viewed as welcome side benefits.

In the face of these apparently irreconcilable perspectives, it is important to clarify several points.

First, the criminal law, for all the efforts and rhetoric expended over the past century, is primarily a punitive institution at root. Certainly the sanctions it metes out — whether justified in the name of treatment, rehabilitation, denunciation, deterrence, incapacitation, or whatever — are and always have been perceived as punitive by almost all of those to whom they are applied. So, whether the question of the purpose of the criminal law is approached from a retributive or a utilitarian direction, it is important to understand that the fundamental nature of criminal law sanctions is punitive.

This should not be particularly surprising since, as Part II discussed, the criminal law and the criminal justice system constitute the end point on a continuum of informal and formal customs, beliefs and institutions of social control — the end point in terms of the ultimately coercive intervention of the state in the lives of usually non-consenting citizens.

Although it may be agreed that the ultimate characteristic of criminal law sanctions is that they punish, this proposition does not mean that the sanctions awarded under the criminal law are to be harsh, cruel, inhumane, or uninterested in the ultimate effect they have on those subject to them. (Indeed, the concept of justice is seen as imposing limits on the extent to which punishment may be inflicted, in the sense that the traditional doctrine of "an eye for an eye" means that it is unjust to take more that an eye for an eye). Neither does the proposition imply that there is a necessary conflict in imposing punishment for retributive and for utilitarian reasons, although there may be such conflict in particular instances. In many cases, imposing punishment for retributive reasons may well have utilitarian effects in terms of deterrence, denunciation and reaffirmation of social values.

Second, on the basis of the long-term perspective adopted in this paper, it appears necessary to conclude that the debate, cast in "either/or" terms, is unresolvable because it is artificial and unrealistic.

This is so because the criminal law has, and should continue to have, two major purposes:

1. preservation of the peace, prevention of crime, protection of the public — security goals; and
2. equity, fairness, guarantees for the rights and liberties of the individual against the powers of the state, and the provision of a fitting response by society to wrongdoing — justice goals.

It must be admitted that there is continuing tension between these two clusters of objectives and that they sometimes come into conflict. Furthermore, while the criminal law is concerned with both sets of purposes, particular components of the criminal justice system place varying emphasis on those purposes.

By recognizing the legitimacy of both the utilitarian and the retributive approaches, and by refusing to equate them with security and justice respectively, we may more productively debate the specific point of balance that is to be struck between the two major purposes of the law and the criminal justice system: justice and security. Thus, if the goal is to pursue "justice", utilitarian concerns about security, protection, prevention, treatment and rehabilitation need not be abandoned. Or, if the emphasis is to be on crime control and public protection, arguments appealing to a retributive justification for punishment in the name of "justice" or "just deserts" need not be dismissed as illegitimate. This is an important consideration to bear in mind, since most recent debates on the issue of the major purpose of criminal law are posed in such a way as to suggest there can be only one such legitimate purpose. Acceptance of this assumption of the necessity for a unique purpose may appear more logically or philosophically appealing, but it does not seem to be realistic in terms of the actual uses to which criminal law is put, and the actual effects it has in society.

In the case of the criminal law, most citizens would agree that criminals ought to be punished because they have done wrong, and therefore deserve punishment. But most would also like to see society protected, either by the punishment of offenders in order to deter or simply incapacitate, or, perhaps preferably, by the rehabilitation of offenders.

The argument in this section is that no social institution as important or complex as the criminal law can afford the luxury of picking just one purpose — intellectually simple and satisfying though that selection might be. As Henry M. Hart wrote in 1958:

> A penal code that reflected only a single basic principle would be a very bad one. Social purposes can never be single or simple, or held unqualifiedly to the exclusion of all other social purposes; and an effort to make them so can result only in the sacrifice of other values which are also important. Thus, to take only one example, the purpose of preventing any particular kind of crime, or crimes generally, is qualified always by the purposes of avoiding the conviction of the innocent and of enhancing that sense of security throughout society which is one

> of the prime functions of the manifold safeguards of . . . criminal procedure. And the same thing would be true even if the dominant purpose of the criminal law were thought to be the rehabilitation of offenders rather than the prevention of offences.

On the basis of this discussion, some important conclusions can be drawn. First, the criminal law and the criminal justice system must pursue two major clusters of objectives — "justice" and "security". Second, criminal sanctions, whether justified in terms of utilitarian or retributive aims, are primarily punitive in nature, and are understood as such both by society and by those on whom they are imposed. Third, acceptance of retributive justifications for punishment implies neither rejection of utilitarian justifications for such punishment, nor the acceptance of harsh, cruel or vindictive forms or levels of punishment. Indeed, the retributive approach that is often expressed in terms of the concept of "justice" acts as a brake in setting a maximum permissible limit on punishment that might otherwise be subject to no such limit in its pursuit of various utilitarian goals such as deterrence, incapacitation, or even rehabilitation. This distinguishes the concept of retribution from that of vengeance. Fourth, recognition of the legitimacy — and necessity — of pursuing two sometimes-conflicting purposes for criminal law, directs attention to the need to devise an approach for defining the proper point of balance between these two purposes.

b) Proper Scope of the Criminal Law

Part II of the paper touched briefly on the trends in penal legislation over the past century, and Part III raised, as a major perceived problem, the question of the proper scope of the criminal law, as opposed to other forms of response to individual and collective behaviour within society.

Those Parts made the point that the criminal law and the criminal justice system should be conceived of as the ultimate recourse available to society along the continuum of informal and formal conventions, customs and institutions.

It is with this conception in mind that the Law Reform Commission, the Ouimet Committee, and many others have urged the doctrine of restraint in the use of the criminal law and the criminal justice system.

This notion — which has unfortunately and inaccurately been interpreted by some as a call for laxity and leniency — is properly understood as implying the need to examine carefully the appropriateness, the necessity, and the efficacy of employing the criminal law, rather than these other, less intrusive, less coercive means of dealing with particular social problems.

For some forms of conduct, this analysis can be quickly concluded. There is no question that the only adequate and fitting response to such "core" crimes as murder, assault, robbery, and so on is the criminal law. No one seriously suggests

otherwise. For other new, sophisticated and potentially harmful forms of activities — especially those of large-scale organizations — use of the criminal law may also be appropriate in some circumstances, in light of the increased dependence of individuals on such organizations with respect to crucial aspects of everyday existence and, therefore, the increased vulnerability of individuals to harmful actions on the part of such organizations.

But, too often, the response to the emergence of a particular social problem has been an almost routine or automatic invocation of the criminal law, or criminal-like sanctions. The discussion above concerning offences of a comparatively trivial or anachronistic nature contained in the Criminal Code, not to mention the huge array of "public welfare" legislation that has grown up in the past century and which relies heavily on criminal sanctions and criminal procedures for its enforcement, bears on this point.

Restraint should be used in employing the criminal law because the basic nature of criminal law sanctions is punitive and coercive, and, since freedom and humanity are valued so highly, the use of other, non-coercive, less formal, and more positive approaches is to be preferred whenever possible and appropriate. It is also necessary because, if the criminal law is used indiscriminately to deal with a vast range of social problems of widely varying seriousness in the eyes of the public, then the authority, credibility and legitimacy of the criminal law is eroded and depreciated. The lumping together of seriously harmful and wrongful conduct with a host of technical, minor, or controversial matters blunts the impact and undermines the effect the criminal law should have as society's institution of ultimate recourse.

The Law Reform Commission and others have argued persuasively for a "pruning" and clarification of the criminal law on the basis of arguments such as these. This process requires consideration of the boundaries that should be drawn to distinguish between criminal law and "public welfare" regulatory and administrative law, criminal law and private morality, and criminal law and civil law.

The Law Reform Commission strongly emphasized the need to distinguish more clearly between "regulatory" offences and "real" crimes. Regulatory processes designed to control certain socially and economically useful enterprises are sometimes viewed as being "too criminal" in nature, because of their inappropriate use of summary conviction criminal procedures to enforce compliance. For the Law Reform Commission, all "real" crimes should appear in the Criminal Code and not in regulatory law, though the Commission also recommends that criminal penalties — jail terms — be available for wilful or persistent violation of regulatory law. The Law Reform Commission recommends that such a distinction be made between crimes and regulatory offences for a number of reasons. These include a need to be parsimonious with the criminal law, in order to preserve the impact of its symbolic and solemn condemnation of violations of "core values". Another reason is the need to observe the principle of equity by ensuring that the most serious transgressions are normally dealt with in a more serious manner and with a more elaborate procedure than other transgressions.

In the boundary between criminal law and private morality, various concerns have been expressed about either decriminalizing or diverting from criminal prosecution many acts widely considered crimes of "going to Hell in one's own fashion", such as drug and gambling offences. Some of these offences are considered too minor to be treated with the heavy hand of the criminal law; others are thought to be more effectively dealt with through public education or regulation.

In the boundary between criminal and civil law, there has been considerable interest, in Canada and elsewhere, in diverting from the criminal process certain disputes which are more in the nature of civil wrongs between citizens, or staying criminal prosecutions for the purpose of allowing the offender to make financial or other redress to the victim. In this view, traditional criminal justice emphasis on allocating blame and punishing the blameworthy has not served the interests of the victim, righted the harm done, restored the "social harmony", nor had any positive impact on the offender. Opponents of this "diversion" approach argue that it may have a lesser deterrent effect on wrong-doing, may not serve social needs to denounce criminal behaviour, has not yet shown any success in diverting offenders who would in fact have been handled in criminal court caseloads, and may endanger the legal rights of the accused and the interests of the victim.

Defining the Boundary

In calling for a re-examination of the substantive content of the criminal law, attention must be devoted to two questions:

- the appropriateness of continuing to treat as criminal some current offences that may not seem to merit use of the criminal law; and
- the need to examine some forms of conduct, not presently dealt with as criminal, with a view to assessing the advisability of treating them as criminal.

This process of re-examination will not be an easy one, nor will it be possible to draw clear and unambiguous boundaries between the various forms of response to conduct outlined above. These boundaries will always be indistinct, and the definition of the boundary in respect to a specific issue, a particular form of conduct seen as posing a social problem, will always be subject to dispute and the application of the individual judgment of Canadians and, more particularly, Parliamentarians, whose collective decision it is to call an act a "crime" or not.

A number of "tests" or "criteria" have been suggested to aid in the process of addressing the key question of whether a particular form of conduct can be dealt with adequately and appropriately through other social institutions, or whether it requires a response by the criminal law.

The Ouimet Report recommended that:

> No conduct should be defined as criminal unless it represents a serious threat to society, and unless the act cannot be dealt with through other social or legal means.

The views of the Report were clear. The criminal sanction should be employed only as an "unavoidable necessity":

> Men and women may have their lives, public and private, destroyed; families may be broken up; the state may be put to considerable expense: all these consequences are to be taken into account when determining whether a particular kind of conduct is so obnoxious to social values that it is to be included in the catalogue of crimes. If there is any other course open to society when threatened, then that course is to be preferred. The deliberate infliction of punishment or any other state interference with human freedom is to be justified only where manifest evil would result from failure to interfere.

In light of this approach, the Ouimet Report adopted a number of criteria to assist in delineating the "proper scope of criminal law":

1. No act should be criminally proscribed unless its incidence, actual or potential, is substantially damaging to society.
2. No act should be criminally proscribed where its incidence may adequately be controlled by social forces other than the criminal process. Public opinion may be enough to curtail certain kinds of behaviour. Other kinds of behaviour may be more appropriately dealt with by non-criminal legal processes, e.g. by legislation relating to mental health or social and economic conditions.
3. No law should give rise to social or personal damage greater than that it was designed to prevent.

This doctrine of restraint, this concept of criminal law as the instrument of last resort or ultimate recourse, also formed the heart of the approach recommended by the Law Reform Commission, especially in "Our Criminal Law."

As noted above, the Commission urged a "pruning" of the criminal law, to draw a true distinction between "real" crimes and regulatory offences. "To count as a real crime an act must be morally wrong. But this . . . is but a necessary condition and not a sufficient one. Not all wrongful acts should qualify as real crimes. The real criminal law should be confined to wrongful acts seriously threatening and infringing fundamental social values."

The principle of restraint was to be applied at every stage, including that of defining the ambit of criminal offences in the first place, and the Commission suggested a set of "tests" for determining what are, and are not, crimes:

- does the act seriously harm other people?
- does it in some other way so seriously contravene our fundamental values as to be harmful to society?
- are we confident that the enforcement measures necessary for using criminal law against the act will not themselves seriously contravene our fundamental values?

- given that we can answer 'yes' to the above three questions, are we satisified that criminal law can make a significant contribution in dealing with the problem?

There are various other formulations of such criteria to be used in determining whether conduct should be criminalized or not — cast in terms of the positive objectives of criminal law and in terms of limiting principles. Some differences in wording are important, some are not. Ouimet spoke of "substantial damage", the Law Reform Commission of "serious harm", as noted above. In the United States, on the other hand, the Model Penal Code spoke of "substantial harm", but the Report of the Brown Commission and subsequent Senate bills referred simply to "harm".

The basic theme, however, is important, in stressing that the criminal law ought to be reserved for reacting to conduct that is seriously harmful. The harm may be caused or threatened to the physical safety or integrity of individuals, or through interference with their property. It may be caused or threatened to the collective safety or integrity of society through the infliction of direct damage or the undermining of what the Law Reform Commission terms fundamental or essential values — those values or interests necessary for social life to be carried on, or for the maintenance of the kind of society cherished by Canadians. Since many acts may be "harmful", and since society has many other means for controlling or responding to conduct, criminal law should be used only when the harm caused or threatened is serious, and when the other, less coercive or less instrusive means do not work or are inappropriate.

It is important to understand that, insofar as they constitute an effort to give legislators, officials and the public some sounder or more explicit basis for judging when conduct that is considered unacceptable might appropriately be made subject to criminal law, as opposed to other kinds of regulation or social reaction, these criteria must be seen as guidelines and not as strict rules.

This is so for two major reasons. First, they must necessarily be stated in rather general and unavoidably subjective terms, and the application of general terms to specific situations always leaves room for different conclusions to be reached.

Second, Parliament has and must continue to have the sovereign authority (within the limits of the Constitution) to respond as it deems appropriate to societal problems and concerns. The process of law-making is a political process, in the best sense of the word, and must be responsive to public concerns.

Parliament and the public may, however, benefit from such criteria in deciding whether some conduct requires a criminal law response. The practice of a century in Canada has shown that Parliament can, and has, found it relatively easy to subject conduct to criminal sanctions in response to specific problems or particular demands. But once an act has been made criminal, it is difficult to remove or lessen criminal penalties, even in response to changes in public attitudes,

perceived inconsistencies in application, or emerging experience demonstrating that use of the criminal law might be excessive, according to one or more of the criteria mentioned above. When the 1892 Code was being debated, for example, some Members of Parliament wondered why it was deemed necessary to create a criminal offence for failing to post a copy of the Criminal Code section outlawing gambling in a public conveyance. No one seemed to know, but it was pointed out that this offence was already in existence, so good reasons would have to be given not to have it. This offence still exists today, as s.191(3) of the Criminal Code.

The main argument for a parsimonious and clarified criminal law is a convincing one, although the difficulties of applying the limiting criteria to specific offences or types of conduct should not be underestimated. The effort required in examining some of the assumptions that have been applied almost automatically in creating our criminal law over the past century is worthwhile in order that the Criminal Law Review may result in a criminal law that is clear, enforceable, effective, and reflective of society's needs and concerns.

In this section, it has been concluded that it makes sense to distinguish between the criminal law and other forms of social control. Furthermore, the analysis of the Law Reform Commission, the Ouimet Committee, and many other bodies both here and abroad has been accepted with respect to the general conception that conduct should be made subject to criminal law sanctions only if it causes or threatens serious harm to individuals or society. This criterion will undoubtedly be subject to wide variation in interpretation.

We now turn to other secondary criteria that may aid in the interpretation of the "harm" test. Two more issues remain to be explored before the guiding statement is articulated. Once it is decided what kind of conduct should be made criminal and for what purpose, it must be asked to whom the penalties should be applied, and whether there are principles that should be considered concerning how far the criminal law and the criminal justice system can go in legitimately pursuing the aims.

c) To Whom Should Criminal Penalties Apply?

The Law Reform Commission argued strongly that criminal sanctions should be applied only to those who are culpable — that is, those who contravene the law "intentionally, recklessly, or at least negligently" as opposed to through "carelessness or failure to attain requisite standards of diligence".

To most, perhaps, this argument seems self-evident. Obviously, society does not want to punish those who did not mean to be criminal. But the argument is not without challengers, and the points they make should be raised here.

The chief principle of criminal responsibility — no criminal liability without fault — is said by some to depend on outdated and unscientific notions of freedom of will,

notions that have been called into question by developments in the understanding of the human psyche, and of the powerful role of heredity and environment in determining the behaviour of individuals.

Admittedly, that understanding may be more in the nature of a general appreciation that there is something much more complicated going on than the simple assumption of the rational, free-willed individual would allow, rather than a spelling out of the relationships and linkages between causes and effects, especially at the level of the individual actor. Nonetheless, that understanding should call into question the notion of individual guilt. Indeed, the very difficulty of determining another's motives, intentions and feelings should give us pause in ascribing criminal liability and imposing punishment on criminals, according to this argument. The tortuous law on insanity, and the complex legal concept of "mens rea" — the concept of the guilty mind — should serve to reinforce the psychological and sociological lessons of the past century, according to this view.

This view is open to several objections. First, the current state of psychological knowledge simply cannot be said to provide an adequate basis to overturn one of the fundamental principles of our legal system. Second, from the pragmatic or utilitarian perspective, the argument is heard that one of the most important aims of criminal justice is reduction or control of crime through the encouragement of respect for law. In this view, the administration of criminal justice must be in accordance with fundamental community values, included among which is the notion that no one should be punished unless "guilty". A third, and perhaps most important argument is that freedom and justice demand that criminal penalties be applied only to deliberate or reckless wrongdoers. Because freedom and justice are more fundamental values than the more specific objective of crime control, they impose constraints upon the pursuit of that more limited objective. Without the principle of "no liability without fault", protections for the liberty of the individual would be greatly reduced, and important safeguards painfully won over the course of centuries would be abandoned to an uncertain future.

On the basis of these arguments, the recommendation of the Law Reform Commission that the principle of responsibility, of culpability, must remain the cornerstone of criminal sanctioning appears to be sound.

But reaffirming this important principle does not mean that no further attention need be paid to the important subsidiary issues involved. The Law Reform Commission is working on those issues, which include the need to identify more clearly the bases for excusing individuals from criminal liability (defences, justifications and excuses) in order to clear up confusion about insanity, drunkenness, duress, entrapment, and so on; the need to clarify the concept of responsibility as an element of proof of criminal guilt (whether distinctions between intent, recklessness, and negligence should be articulated or reformulated in the law); the need to give more consideration to the responsibility and liability of individuals acting for organizations, and organizations for the actions of their individual agents, and so on.

To summarize, it is vital to retain the standard of responsibility and fault for a finding of criminal liability, because of the significant meaning and impact of the criminal process and criminal sanctions. Second, it is important to clarify the ambiguities which currently exist as to the precise standard of culpability required for each criminal offence. Third, it is not necessary or desirable to confine the criminal law to acts committed by individuals against other individuals; rather, it is advisable to clarify and give greater consideration to the liability of organizations, and individuals acting within organizations, where serious harm to an individual or to the general good is caused or threatened.

d) How Far Can Criminal Law Go in Pursuing its Aims?

Canadian jurisprudence already contains a well-established body of criminal law principles whose main import is to protect the individual against the power of the state. These principles, largely concerned with questions of criminal law procedure (as distinguished from the substantive scope of the criminal law discussed earlier), are central to our ideas of justice, equity and fairness. They include the principle of legality, the presumption of innocence, the right not to be subject to arbitrary arrest or detention, the right to a fair hearing before an independent and impartial adjudicator, and freedom from cruel and unusual punishment. The recent enactment of the Canadian Charter of Rights and Freedoms sets forth those time-honoured principles and entrenches them in the Constitution of Canada. Other similar principles are found in the related law of evidence, which requires the prosecution to prove every material element of an offence beyond a reasonable doubt, protects individuals against self-incrimination, and so on. These principles are re-stated in the draft Uniform Evidence Act, prepared by a federal-provincial Task Force in 1981.

The concept of justice, as well as imposing constraints on the manner in which the state can act, also imposes a positive duty in requiring the criminal law to respond to certain forms of conduct: anything short of such a response would imply an inappropriate attitude to the public interest or societal value attacked by that conduct. This notion also applies to the next concept to be discussed, that of necessity.

The Ouimet Report stated "as a fundamental proposition that interference with individual liberty can only be justified where it is clearly necessary in the interest of society as a whole, and that no greater interference with individual liberty than is necessary to protect the interests of society is justifiable".

This formulation could also be applied to the process of determination of dispositions, to require the availability of a range of sanctions in law, an onus to apply the least restrictive form of sanction adequate to the circumstances, and a requirement to restrict the amount of that sanction to that which is justifiably

necessary and adequate. Reference to "adequacy" is important since it sheds light on a point made earlier about the doctrine of restraint: that it should not be confused with leniency and laxity. For some offences, necessity, like justice, will require anything but restraint (in the sense of leniency). For other offences and offenders, the circumstances, viewed from the perspective of justice and necessity, may dictate a restrained approach.

This leads to the third concept to be discussed, that of economy. This concept should not be equated with the notion of a cold-blooded pursuit of lowering the "unit costs" of the "crime control" objectives of the criminal justice system at the expense of individual rights, justice and fairness. Instead, it is an elaboration of the concept of necessity, in contemplating the notion of state intervention to the minimum necessary and adequate extent.

As was pointed out earlier, the retributive notion of justice contains this concept within it, in setting out a limitation on the extent to which the state may punish offenders: the punishment must not exceed the wrong done. In countries sharing Canada's legal tradition, these principles are also reflected in a doctrine that the state should limit its intervention to "the least drastic alternative" sufficient in the circumstances.

These concepts require consideration of whether the desired end can realistically be achieved, at an acceptable social and financial cost. In this sense, reservations about effectiveness may restrain the impulse to take a certain course of action. This factor is of relevance in considering the fact that, in 1979, it cost an average of $69 a day to incarcerate a convicted offender in a federal penitentiary. The cost of building a new penitentiary is around $30 million. At that cost, it may be wondered who is punished more by a sentence of imprisonment — the prisoner, or the taxpayer — especially in cases where imprisonment does not seem to be an obviously necessary sanction to allow an adequate and appropriate response to be made to the offence or the offender in question.

Taken together, the substantive and procedural limiting principles discussed in this Part embody aspects of the justice objectives of the law and, in so doing, act as restraints on the extent to which the law and the system may legitimately pursue the security objectives. The tension that results necessitates consideration of the appropriate emphasis that should be assigned to competing claims about the appropriate point of balance of the scales.

It is to this concept of "balance" that attention must now briefly be turned.

3. The Concept of Balance

Throughout this paper reference has been made to the notion of balance, and, indeed, it would appear that this metaphor is fundamental to the approach taken to criminal law issues through the years. In considering specific amendments to the

criminal law, in assessing proposals for changes to offences, police powers or sentencing provisions, the idea of balancing competing purposes and principles is referred to repeatedly.

The search for the appropriate point of balance applies to a number of dimensions:

- balance between individual liberties and the provision of adequate powers for the state to allow for effective crime prevention and control;
- balance among the various subsidiary aims of the system, such as denunciation, deterrence and rehabilitation; and
- balance between Parliament's role in leading public opinion and acting as custodian of important, if sometimes unpopular principles, and Parliament's role in reflecting and responding to public concerns.

The British Royal Commission on Criminal Procedure (1981) discussed the concept of balance in a useful way, pointing out that, while the "idea of consciously seeking within the criminal justice system to define a balance between the rights of individuals and the security of society and the state has been growing, discussion has not often moved beyond the level of generality."

This is a real problem, since, in attempting to apply the concept in particular circumstances to specific proposals, one person's "balance" might well be another's "intolerable excess", depending on basic assumptions about the legitimacy of subjecting certain principles to utilitarian compromise, on perceptions about the nature of the problem being addressed, on conclusions concerning the acceptability of the "trade-off" being made, and so on.

But there would appear to be contained in the discussion in earlier sections of this Part the seeds of a more practical approach, an implicit methodology that can be used to sort out competing claims as to the appropriate point of balance. This approach, too, is at the level of principle, but is cast in terms of a presumption, onus, or burden of proof that must be discharged by reference to facts and experience.

This approach seems in keeping with the traditionally pragmatic approach taken to questions of policy in our system. The initial question is usually posed, not in terms of a deductive argument from first principles, but rather in terms of the perception of particular problems seen to be in need of solution. This requires an appeal to be made to fact, experience, and evidence. But a framework of principles is needed in order to assess the adequacy and appropriateness of proposed solutions to the perceived problems. The methodology developed by the British Royal Commission on Procedure was described in the following terms:

> if any acceptable balance . . . was to be found, the right strategy was to develop an approach which identified the main issues, constructed as firm a factual basis as possible and undertook the analysis of existing procedures and proposals for change within a framework of general principles.

Thus, the interlinked concepts discussed in this Part serve to restrict the appropriate scope of the criminal law to that conduct which is culpable, seriously harmful, and generally conceived of as deserving of punishment. They also restrict the appropriate form and amount of powers and sanctions by virtue of well-recognized legal rights, largely of a procedural nature, and by the imposition of a burden of proof on the state to demonstrate on reasonable factual grounds that intrusion into individual rights and freedoms is necessary, and that it does not exceed the minimum necessary and adequate in the circumstances.

In essence, this methodology shifts the debate over criminal law objectives and principles, to the extent possible, onto grounds that allow for an objective appeal to observable fact and experience as opposed to pure combat by moral philosophy.

Approaching the question of balance in this manner leads to a discussion in terms of practical goals and means, but within a framework of principles that give meaning and priority to the basic individual liberties and freedoms that remain the keystone of our conception of the relationship of the individual and the state.

4. Conclusion: A Proposed Statement of Purpose and Principles

The discussion on these points has been lengthy because the conclusions reached are of paramount importance to the overall policy. It now remains to bring the discussion together, and, in so doing, to state a general conception of the appropriate framework of purpose and principles that should govern the approach to more particular issues of criminal law policy.

Having considered the Reports of the Law Reform Commission, the Ouimet Committee, numerous other committees, commissions and learned papers both here and abroad, and having weighed the arguments concerning the various perspectives that can be adopted with respect to the criminal law, it seems justifiable and appropriate to endorse the general philosophy of restraint in criminal law, on the understanding that "restraint" is a shorthand way of referring to principles of justice, necessity and economy, and that it does not imply laxness and leniency.

With these considerations in mind, a general statement of purpose and principles may be articulated as follows:

STATEMENT OF PURPOSE AND PRINCIPLES

Recognizing that:

In the Charter of Rights and Freedoms, Canada has guaranteed certain rights and freedoms consonant with the rule of law and with principles of justice fundamental to a free and democratic society;

Canada has, in addition, undertaken international obligations to maintain certain standards with respect to its criminal justice system;

The criminal law is necessary for protection of the public and the establishment and maintenance of social order;

The criminal law potentially involves many of the most serious forms of interference by the state with individual rights and freedoms; and

Criminal law policy should be based on a clear appreciation of the fundamental purpose and principles of criminal law;

It is appropriate to set forth a statement of purpose and principles for the criminal law in Canada.

Purpose of the Criminal Law

The purpose of the criminal law is to contribute to the maintenance of a just, peaceful and safe society through the establishment of a system of prohibitions, sanctions and procedures to deal fairly and appropriately with culpable conduct that causes or threatens serious harm to individuals or society.

Principles to be Applied in Achieving this Purpose

The purpose of the criminal law should be achieved through means consonant with the rights set forth in the Canadian Charter of Rights and Freedoms, and in accordance with the following principles:

(a) the criminal law should be employed to deal only with that conduct for which other means of social control are inade-

quate or inappropriate, and in a manner which interferes with individual rights and freedoms only to the extent necessary for the attainment of its purpose;

(b) the criminal law should clearly and accessibly set forth:

(i) the nature of conduct declared criminal;

(ii) the responsibility required to be proven for a finding of criminal liability;

(c) the criminal law should also clearly and accessibly set forth the rights of persons whose liberty is put directly at risk through the criminal law process;

(d) unless otherwise provided by Parliament, the burden of proving every material element of a crime should be on the prosecution, which burden should not be discharged by anything less than proof beyond a reasonable doubt;

(e) the criminal law should provide and clearly define powers necessary to facilitate the conduct of criminal investigations and the arrest and detention of offenders, without unreasonably or arbitrarily interfering with individual rights and freedoms;

(f) the criminal law should provide sanctions for criminal conduct that are related to the gravity of the offence and the degree of responsibility of the offender, and that reflect the need for protection of the public against further offences by the offender and for adequate deterrence against similar offences by others;

(g) wherever possible and appropriate, the criminal law and the criminal justice system should also promote and provide for:

(i) opportunities for the reconciliation of the victim, community, and offender;

(ii) redress or recompense for the harm done to the victim of the offence;

(iii) opportunities aimed at the personal reformation of the offender and his reintegration into the community;

(h) persons found guilty of similar offences should receive similar sentences where the relevant circumstances are similar;

(i) in awarding sentences, preference should be given to the least restrictive alternative adequate and appropriate in the circumstances;

(j) in order to ensure equality of treatment and accountability, discretion at critical points of the criminal justice process should be governed by appropriate controls;

(k) any person alleging illegal or improper treatment by an official of the criminal justice system should have ready access to a fair investigative and remedial procedure;

(l) wherever possible and appropriate, opportunities should be provided for lay participation in the criminal justice process and the determination of community interests.

V. IMPLICATIONS FOR THE CRIMINAL LAW REVIEW

This statement of purpose and principles provides a general framework within which more specific policies can be developed and assessed. Because such statements of principle are necessarily framed in fairly general terms, this final Part of the paper spells out some of the principal implications of the statement for the Criminal Law Review. At this stage of the Review, it would be premature to try to list and explore all the legislative and policy issues related to this statement, although those issues must of course be dealt with by the Review. An attempt is made in this Part, however, to give a clearer indication of the themes and priorities that will be applied in the Review process as a whole.

Also, while some reference will be made to implications for the criminal justice system, the main focus is on questions of legislative policy. This is as it should be, since this paper relates to the Criminal Law Review, and does not purport to be an overall statement of criminal justice policy, for reasons discussed earlier and in the final part of the paper.

1. Preamble

Recognizing that:

In the Charter of Rights and Freedoms, Canada has guaranteed certain rights and freedoms consonant with the rule of law and with principles of justice fundamental to a free and democratic society;

Canada has, in addition, undertaken international obligations to maintain certain standards with respect to its criminal justice system;

The criminal law is necessary for protection of the public and the establishment and maintenance of social order;

The criminal law potentially involves many of the most serious forms of interference by the state with individual rights and freedoms; and

Criminal law policy should be based on a clear appreciation of the fundamental purpose and principles of criminal law;

It is appropriate to set forth a statement of purpose and principles for the criminal law in Canada.

The Preamble to the Statement of Purpose and Principles of the criminal law summarizes the legal and social context of the criminal law affecting the process of the Criminal Law Review.

As an important contribution to human rights legislation, the Canadian Charter of Rights and Freedoms has special significance for criminal justice, in terms of the limits it imposes on state power to interfere with basic individual liberties. The implications of the Charter will, of course, become clearer over time, through judicial, legislative and administrative developments. The fundamental review of criminal law must also necessarily consider whether existing law and administrative directives contain gaps or inadequacies in respect to the Charter. This exercise is now proceeding at many levels, and its results will directly influence the Review through interpretation and application of the Charter's meaning for each of the principles enunciated in the statement.

Canada has also agreed to certain international human rights standards which bear directly and indirectly on criminal justice. The meaning of these, like the Charter, will continue to evolve through various international mechanisms for discussion, reporting by individual nations, and the consideration of individual cases. Perhaps the most significant of these agreements, the International Covenants on Civil and Political Rights, and on Economic, Social and Cultural Rights, are being considered in the context of the current federal review of the implications of the Charter. They will therefore necessarily influence the Criminal Law Review as well.

The third preambular statement reaffirms the place of the criminal law as a necessary component among the social control mechanisms which protect the public and maintain social order. This is not to imply that it is only the criminal law which serves to maintain order or protect the public. In some situations, other means may suffice to meet society's interests in the case.

Read together with the fourth preambular statement, this implies that, because of the potential gravity of a criminal conviction or criminal sanction, the invocation of the criminal law should be subject to explicit limitations.

The fifth preambular statement serves to underline the mandate given by Cabinet in 1981 to conduct a "fundamental" review of criminal law which would explicitly address questions of purpose and principle. Attention to these issues also requires a clearer understanding of the differences between criminal and non-criminal conduct, as expressed in the offence and sanction-creation and enforcement provisions of federal statutes.

2. Statement of Overall Purpose

The purpose of the criminal law is to contribute to the maintenance of a just, peaceful and safe society through the establishment of a system of prohibitions, sanctions and procedures to deal fairly and appropriately with culpable conduct that causes or threatens serious harm to individuals or society.

The twin purposes of justice and security are embedded in this overall statement of the criminal law's purpose.

The criminal law is said to "contribute to" the achievement of security aims because it is recognized that the criminal law alone cannot be a sufficient tool of social protection and order, but must be supplemented by a vast array of other social, moral, personal and economic incentives and contraints. The criminal law is the apex of a pyramid of more or less serious personal and social processes.

The three aims of justice, peace and safety are interrelated but separable. "Justice", or the imposition of a just settlement of a criminal conflict, dispute or harm, may in a sense be an end in itself; the preservation of the social fabric may demand that certain serious misconduct be dealt with in the solemn forum of the criminal process, even if no immediate risks to peace and safety are involved. In addition, the settlement of a criminal situation through the criminal law may contribute to peace and safety, reinforce the boundaries of acceptable conduct, and reaffirm certain fundamental values.

The statement of overall purpose refers to a "system" of both criminal law and criminal justice, since the law and the manner in which it is administered are inseparably linked.

Mention of "prohibitions" serves as a criterion distinguishing between criminal law and most "regulatory" law. The desirability of restricting the scope of criminal law is implied, in that the high value placed on freedom and liberty in Canada requires minimization of the scope of "prohibited" conduct. Use is made of the term "sanctions" in order to convey different aspects of that term. First, sanctions are understood to mean the specific penalties enacted to enforce obedience to a law. As was mentioned earlier, this notion is in line with the ultimately coercive and punitive nature of criminal law. But, as was also discussed earlier, this does not mean to imply that criminal law sanctions must be harsh or cruel. The presence in the criminal law of sanctions encouraging reformation, reintegration and reconciliation — many of which have been introduced in recent decades — demonstrates this point, and in so doing illustrates the second aspect of the concept of "sanctions", which extends the first aspect to include "the provision of rewards for obedience, along with punishments for disobedience, to a law".

The statement also states the most basic criterion guiding the decision as to which conduct should be considered most suitable for a criminal law response, namely that the conduct must cause or threaten serious harm to individuals or society. This concept was discussed in Part IV.

This does not mean that no other criterion should be considered in determining when and whether to employ the criminal law for particular forms of conduct, and the criminal justice process in individual instances. Principles (a) and (b), below, are also to be considered in deciding whether to invoke the criminal law or process, or to determine a finding of liability or impose a particular sanction.

The concept of blameworthiness is so central to the overall purpose of the criminal law that the nature of criminal conduct is further qualified as being "culpable" in nature. The term "culpable" is not meant in a technical, legal sense here, but in the general sense that some mental element on the part of the wrong-doer is involved. For example, matters of pure accident will not normally be crimes, since it would be fundamentally unfair to place the stigma of a criminal conviction on an individual in such a case. The discussion in Part IV of the persons and organizations to whom the criminal law should apply, should be read to aid interpretation of this non-technical meaning of "culpability". However, the issues of criminal responsibility and defences are so complex that they defy clear explication in a general document such as this. The Law Reform Commission will shortly issue preliminary recommendations as to the mental element which should normally form a necessary part of a "criminal" finding. These recommendations will, in turn, affect a future part of the Criminal Law Review. Thus, at this point, only the most general of indications is necessary and appropriate on the subject of the offender's state of mind with regard to the conduct in question. A great many issues and legal concepts will still remain to be addressed in depth at a future stage, to say nothing of the more practical questions of either creating new "technical" terminology, or trying to clarify traditional terms like "intent", "recklessness", "purpose", "knowledge", "negligence", and so on.

3. Principles to be Applied

Introductory Phrase

The purpose of the criminal law should be achieved through means consonant with the rights set forth in the Canadian Charter of Rights and Freedoms, and in accordance with the following principles:

This phrase, echoing the reference in the preamble to the Charter, emphasizes its significance for criminal law and the criminal justice system. This is especially the case for the legal rights contained in sections 7 through 14, which set out a number of the most important procedural safeguards for individual rights against intrusion by the state.

Principle (a)

(a) the criminal law should be employed to deal only with that conduct for which other means of social control are inadequate or inappropriate, and in a manner which interferes with individual rights and freedoms only to the extent necessary for the attainment of its purpose;

This Principle embodies the concept of minimum necessary intervention discussed in Part IV. As the most serious form of social intervention with individual freedoms, the criminal law is to be invoked only where necessary, when the use of other means is clearly inadequate or would depreciate the seriousness of the conduct in question. As well, the Principle suggests that, even after the initial decision has been made to invoke the criminal law, the nature or extent of the response by the criminal justice system should be governed by considerations of economy, necessity and restraint, consonant of course with the need to maintain social order and protect the public.

Principle (b)

(b) the criminal law should clearly and accessibly set forth:

(i) the nature of conduct declared criminal;

(ii) the responsibility required to be proven for a finding of criminal liability;

This Principle reflects the need for the criminal law to be as understandable, accessible and unambiguous as possible in the notice it gives to Canadians concerning the standards of conduct required of them, both in terms of specifically forbidden conduct, and in terms of overall standards of care and consideration or knowledge of one's legal duties to others.

More specifically, paragraph (i) implies the need to define the offence sections contained in the Criminal Code, and in any other federal statutes containing criminal offences, in clear and simple language. This should not, however, be taken to mean that either substantive or procedural provisions should sacrifice specificity in the pursuit of simplicity. In addition, attention must be given to the manner in which the criminal law is communicated to Canadians, given its importance as an element of social policy.

The reference to "criminal" conduct implies the need to draw a clearer distinction between crimes and "non-crimes", as was recommended by the Law Reform Commission in "Our Criminal Law" and as was discussed throughout this paper. The Review must consider the desirability and practicality of:

- differences in statutory language — identifying or labelling "criminal offences" clearly and distinguishing them from non-criminal "infractions" or "contraventions";

- differences in search, seizure and arrest powers under the various statutes;
- differences in the powers of courts or tribunals, with respect to such matters as summoning of witnesses, admission of evidence, standard of proof, appeal;
- differences in sanctions available, especially imprisonment;
- differences in the creation, use, retention and accessibility of information contained in records of the investigation, charging and conviction of offenders; and
- differences in the standard of responsibility or culpability required to be established.

Practical matters of enforcement and statutory location will have to be addressed in assessing the practicality of the various ways in which this process of clarification can be accomplished. In the matter of statutory location, for example, the Law Reform Commission has suggested that the distinction between "real" crimes and other offences should be made clear by placing all true crimes in the Criminal Code. There are, however, other ways of indicating the distinction, such as the "labelling" approach taken in many civil law jurisdictions. This approach entails identifying "crimes" as opposed to "non-crimes" by statutory language, thus allowing for offences of either type to be located in the relevant subject-matter statute. Considerations of relevance, accessibility and effective enforcement could have a bearing on the approach adopted. This task, it should be noted, will require a major effort to be devoted to the examination and revision of the 300 or so federal statutes containing offence sections. This work will have to be coordinated with that in the area of administrative and regulatory law reform, the groundwork for which has been laid by the Law Reform Commission, the Economic Council of Canada, and the Parliamentary Task Force on Regulations, among others.

Paragraph (ii) refers to standards of responsibiity and requires that they be set forth clearly and accessibly. As suggested above, this will involve a clarification of both the concepts and the language of the "mental element" of crime, and the available defences and excuses. The specific standard of responsibility required for a criminal conviction must be clearly specified.

Principle (c)

(c) the criminal law should also clearly and accessibly set forth the rights of persons whose liberty is put directly at risk through the criminal law process;

This Principle requires that Canadians be made better aware of their substantive and procedural rights vis-à-vis the criminal law. Many of these rights are elaborated only at common law, or for other reasons are not clear and accessible to the public. This statement does not require, however, that every existing or emerging

right be defined in the Criminal Code or other criminal legislation; the volume of provisions needed would in itself create a lack of clarity. But where "liberty" is at risk, statutory definition of one's rights is fundamental and necessary. This is in keeping with the Charter's requirement that limitations on any of the rights and freedoms in it must be "prescribed by law".

Principle (d)

(d) unless otherwise provided by Parliament, the burden of proving every material element of a crime should be on the prosecution, which burden should not be discharged by anything less than proof beyond a reasonable doubt;

This Principle states one of the fundamental guarantees of individual liberty, and reflects a central principle of the law of evidence. It does not preclude exceptional instances where the onus of proof is shifted from the prosecution to the defence.

Principle (e)

(e) the criminal law should provide and clearly define powers necessary to facilitate the conduct of criminal investigations and the arrest and detention of offenders, without unreasonably or arbitrarily interfering with individual rights and freedoms;

This Principle recognizes that the security objectives of the criminal law require criminal justice officials to have certain powers sufficient to enable them to perform their duties, and balances that recognition by imposing the restriction that such powers should not permit unreasonable or arbitrary interference with individual rights. The discussion in Part IV on the concept of balance bears directly on this point. Consideration of this Principle will be central to future discussions of police powers, in light of recent recommendations from a number of sources.

Principle (f)

(f) the criminal law should provide sanctions for criminal conduct that are related to the gravity of the offence and the degree of responsibility of the offender, and that reflect the need for protection of the public against further offences by the offender and for adequate deterrence against similar offences by others;

This Principle, which must be read together with Principles (g), (h) and (i), underlines the need for sentences to reflect, above all, the seriousness of the harm involved in the criminal conduct, and the degree of culpability of the offender. Without denying the importance of other factors to be taken into consideration in the sentencing process, this wording is intended to emphasize the primary place of these two factors in the sentencing equation. The reference to deterrence and

public protection in this Principle is intended to reflect earlier discussion in this paper concerning the lack of precise understanding of how these objectives are fulfilled, and of which sentencing options are likely to be effective in individual instances.

The Principle also implies that the Review must examine the relative seriousness of the various offences contained in the Criminal Code, and where appropriate, rationalize the sanctions presently assigned to each, in view of the overall penalty structure and the manner in which the present offences are arrayed within that structure. This may require some alteration to the relative and the absolute degrees of severity in the sanctions attached to various offences. In addition, consideration must focus on the Law Reform Commission's recommendations with respect to maximum sentences and the abolition of dangerous offender legislation and minimum mandatory sentences, in its Report on Dispositions and Sentences (1976). In this context, attention should also be devoted to a number of other proposals that have emerged since that time, including recommendations of the British Advisory Council on the Penal System (1978) that maximum statutory sentences for most offences be cast in terms of the average or ordinary offender, rather than according to the traditional criterion of the worst reasonably imaginable case. This will require consideration, in turn, of the various means by which an appropriate and fair distinction can be drawn between the average offender and the extraordinary (dangerous, aggravated, repeat) offender.

Principle (g)

(g) wherever possible and appropriate, the criminal law and the criminal justice system should also promote and provide for:

(i) opportunities for the reconciliation of the victim, community, and offender;

(ii) redress or recompense for the harm done to the victim of the offence;

(iii) opportunities aimed at the personal reformation of the offender and his reintegration into the community;

This Principle emphasizes the importance of options other than imprisonment and fines, the traditional cornerstones of criminal sentences. Alternative types of processes or sentences such as probation are already allowed and are in use. But the extent to which they are employed varies, and the legitimacy of other alternatives, such as restitution, community service orders (discussed below), and reconciliatory alternatives more generally, is not accepted in many areas. This Principle is therefore intended to recognize the legitimacy of such alternatives, and to remove formal and informal barriers to their use where the nature and circumstances of the case make them appropriate.

Not all areas in Canada permit opportunities for victim-offender reconciliation by creating programs of dispute resolution, or by allowing privately-run citizen conflict mediation projects to work with clients who are charged with and victims of criminal offences. Reconciliation is aimed at resolving the dispute which resulted in the criminal act and solving the problems or changing the circumstances which contributed to the dispute. Reconciliation is usually most relevant in cases where the parties are acquainted (as in family disputes) or have a special duty or relationship to one another (as in landlord-tenant matters). In instances such as these, reconciliation can have a greater preventive effect than traditional criminal processes and punishment. Of course, reconciliation of the parties may not always be adequate or appropriate in the circumstances. Care must also be taken to ensure that no mediated solution be permitted to violate the legitimate rights of the victim or the offender.

This Principle does not require these alternatives in instances where they are inadequate or inappropriate. They are options which are more responsive to the needs of victims in some cases, but should not be taken as implying that the criminal law should be applied as a means of civil debt collection.

The second alternative noted in the Principle is redress or recompense for harm done to the victim. Traditional criminal sentences often do little to address the most immediate needs of victims by providing for or ordering recompense for the harm done financially and emotionally. These reparative alternatives may, in uncomplicated cases, include restitution by the offender and, as for violent offences in most provinces, compensation (usually quite separate from the criminal trial) from government funds to victims for their damages. Reparation may also take the form of redress made to the community at large, through such dispositions as community service orders. The Federal-Provincial Task Force examining "justice for victims of crime", referred to earlier, is looking into matters related to this Principle.

The third part of the Principle recognizes the continuing importance of developing alternatives which may assist in the rehabilitation or reintegration of the offender into the community. These are distinguished from other alternatives as involving interventions with the offender which are primarily designed to reduce his or her propensity to crime. The use of the term "opportunities" reflects the belief that no one can be rehabilitated against his or her will. The references to "reintegration into the community" reflects the notion that crime does not develop in a vacuum, and intervention with the offender will often necessitate intervention with the community as well. The services available in the community may have a better chance than jails of succeeding in affecting the environmental factors which contribute to crime. There may be a need for an expansion in the type and availability of programs in the community, in order to increase the meaningfulness of the sentence choices available to judges, and to develop the maximum potential for personal reformation.

Principle (h)

(h) persons found guilty of similar offences should receive similar sentences where the relevant circumstances are similar;

This Principle reflects the importance of equity in the decision as to sentence. This implies that the significance of the sentencing stage is so critical to the interests of society and the offender that it deserves special mention and special attention devoted to ensuring similarity of treatment for persons who are alike in relevant respects. This Principle reflects the importance of equity as one aspect of justice.

Principle (i)

(i) in awarding sentences, preference should be given to the least restrictive alternative adequate and appropriate in the circumstances;

This sentencing Principle reflects the general principle of employing the minimum necessary intervention which is adequate in the particular circumstances. Sentencing has a particularly significant place in a discussion of necessity, as in the criminal law itself. This Principle, read together with the three which precede it, implies that a hierarchy of sentencing options, from the least to the most serious, should be available (at least potentially) for most offences, and that in effect the use of the more serious alternatives must be justified on grounds of necessity.

Principle (j)

(j) in order to ensure equality of treatment and accountability, discretion at critical points of the criminal justice process should be governed by appropriate controls;

This Principle requires attention to be given to the formulation and imposition of appropriate and effective controls on discretion through substantive and procedural guidelines — some of which might be contained in statutes — applicable to decision-making by criminal justice officials at "critical points" of the process. Such critical points would include arrest, charge, bail, sentence, classification, transfer, discipline, release and clemency. In some cases, it may be preferable to provide for such guidelines in the form of administrative directives, available to the public, rather than in legislation, because of the need for flexibility and openness to change.

The language of this Principle implies the need for an articulation of specific policies governing the exercise of the initial discretion to invoke the criminal process, and the subsequent discretion to make other decisions about criminal cases. It therefore also implies formal recognition of the discretion not to arrest and prosecute

offenders who have committed non-serious acts and who can be handled by less formal means. The other decision points in the criminal justice system mentioned above are equally important, and many of them should also be governed by more clearly stated policies.

To focus on another example, guidelines applicable to sentencing and post-sentencing processes would be developed, with a view to reflecting such concerns as:

- assuring fairness and predictability in sentencing while maintaining the flexibility needed to take into account certain specified aggravating and mitigating factors;
- recognizing the importance of imprisonment and its alternatives in the formulation of sentencing guidelines;
- establishing means of evaluating the effectiveness of sentencing policy and the actual use made of sentencing powers;
- establishing means of training judges and other justice system officials in the meaning, interpretation, and use of sentencing guidelines;
- developing appropriate guidelines for crown prosecutors, governing the laying of charges and negotiation of pleas, in recognition of the extent to which these processes affect the severity and consistency of sentences; and
- preventing increased demand on prison capacity or increased average time served in prison as a result of the use of such policies, by establishing that imprisonment should be used only when lesser sanctions are inadequate or inappropriate, by reflecting developments in behavioural science and by taking account of presenting sentencing practice and resource availability.

The formulation and application of appropriate controls is a task that will require attention at a number of different points, and by a number of different authorities in the system, in light of the fact that responsibility for the various components of the criminal justice system is shared both between and within levels of government. The maintenance of the independent authority of the judiciary, provincial Attorneys General, and the federal Parliament, for example, must be respected within their spheres of responsibility.

Principle (k)

(k) any person alleging illegal or improper treatment by an official of the criminal justice system should have ready access to a fair investigative and remedial procedure;

This Principle requires systematic attention to be paid to the various forms of remedies, including but not limited to judicial appeal and review, that could be provided for citizens who believe they have been aggrieved by any process or

official of the criminal justice system. This would be consonant with the spirit of the Charter of Rights and Freedoms, and could go beyond it in considering a wide range of possible remedies.

Among the remedies contemplated by this Principle are: formalized citizen complaint procedures (Bill C-69 contains such a proposal with respect to public complaints against RCMP members); police, judicial, and corrections commissions; mediation and arbitration procedures (where appropriate); and, of course, judicial appeal and review, both as provided for explicitly by statute and in the form of the general power of enforcement provided for in section 24 of the Charter of Rights and Freedoms. An important consideration in this connection is that the provision of less formal and more "grass roots" forms of remedy must not unreasonably delay or have a chilling effect on the right to seek judicial review.

Principle (l)

(l) wherever possible and appropriate, opportunities should be provided for lay participation in the criminal justice process and the determination of community interests.

Criminal law and criminal justice have become somewhat removed from the scrutiny and involvement of the ordinary citizen. This was felt by the Law Reform Commission to jeopardize effectiveness as well as humaneness. Examples of lay involvement in the criminal justice system at present include "neighbourhood policing", in which community representatives have a direct say in the law enforcement norms of their neighbourhood, and "courtwatchers" programs, in which citizens play a watch-dog role. Various other applications of this Principle are possible, providing care is taken to represent all significant community interests, to preserve accountability, and to safeguard the public and the offender from abuses.

VI. CONCLUSION

The aim of this paper, as expressed at the beginning, was to give an appreciation of the context within which criminal law policy must be considered, to articulate a statement of principles and objectives for criminal law based on an analysis of its basic purpose and functions, and to spell out some major implications of that statement for the Criminal Law Review.

In undertaking this task, the Government was responding to the suggestions of many who called for a formal official statement of the way in which criminal law and criminal justice policy questions were to be approached.

Criminal Law Focus

This paper adopted a progressively narrower and deeper focus as it proceeded. The discussion of context and problems was cast in the broadest possible terms, through consideration of questions of law, of operations, of resources, and of program effectiveness. This was done on the basis of a clear appreciation of the interrelatedness of the law and the system that administers it.

But, as was said earlier, this paper is not, and was never intended to be, a statement of overall criminal justice policy. For one thing, the primary focus of the Review, of which this paper forms part, is on the criminal law — the statutes — not the system as a whole (despite the recognition of the mutually-interacting relationship of law and system referred to above). For another thing, the fragmented and divided nature of the criminal justice system — both between levels of government and between components of the system — diminishes the practical possibility, and, to a degree, the theoretical desirability, of such an overall justice system policy. It is for these reasons that such important issues in the administration of justice as crime prevention, staff training, community programs, and the treatment of native offenders and female offenders have been the subject of little or no discussion in this document.

The Criminal Law Review

The Criminal Law Review process is well advanced in certain respects. As was noted at the outset, the Law Reform Commission has already conducted exten-

sive legal and policy research and analysis on many aspects of criminal law and criminal justice, as is shown in the Study Papers, Working Papers and Reports published over the last decade. By the end of 1985, the Commission is scheduled to complete work and make recommendations on the remaining areas of criminal law, and to publish a number of Working Papers and Reports on many areas of substantive and procedural law.

The federal Department of Justice and Ministry of the Solicitor General, in conjunction with other federal departments and agencies and provincial governments, will review the findings and recommendations made in those Reports with a view to preparing legislative proposals for the consideration of Parliament. Because of the enormity of the task, and the priority placed on achieving results, the Review will, when possible, proceed on the basis of incremental implementation: that is, as soon as decisions are made on specific elements of the criminal law, legislative proposals will be brought forward.

While this paper does not make specific proposals for legislative action, it is very much a part of this integrated process of analysis, recommendation and response. In providing an official government response to the major Law Reform Commission recommendations concerning the general direction and purpose of the criminal law, the paper is intended to give guidance to the Review process as a whole, as it moves to consider the myriad of more specific issues that must be addressed.

General Theme

This general guidance can be seen as an endorsement of the fundamental approach to criminal law adopted by the Law Reform Commission and the Canadian Committee on Corrections (Ouimet Committee). In essence, this approach calls for restraint to be employed in the use of criminal law and the criminal justice system, on the basis of a conception of the criminal law as the ultimate point along the spectrum of society's informal and formal methods of dealing with conduct.

Because of the coercive and, at root, punitive orientation of the criminal law and its sanctions, we should reserve their use only for matters of serious concern, for conduct that causes or threatens serious harm to individuals or society. Because we believe in the integrity and responsibility of the individual, and because we cannot afford to blunt the credibility and legitimacy of the criminal law in the eyes of the public, its use should as a general rule be limited to culpable, responsible conduct.

The temptation to respond to emerging social problems or sensational but atypical events through the vehicle of the generally-applicable criminal law must therefore be resisted, according to this approach, and a dispassionate assessment made of the validity of employing the criminal law, as opposed to other, less intrusive or more specialized means.

The experience of over a century with criminal law policy in Canada has reinforced the conclusion that a restrained approach should be taken in considering the specific uses to which the criminal law should be put.

Credible, Effective and Reflective Law

If the approach set out in this paper is used as a framework to guide the consideration of the specific substantive and procedural issues to be addressed by the Review over the next years, a criminal law that is credible, effective and reflective of the interests and values of Canadians should result.

It is not so much the law, nor even the agencies of the justice system that have the major impact on creating a just, peaceful and safe society — a society in which we want to live. Rather, justice and peace are functions of the attitudes and behaviour of individual citizens, and the understanding and support they give to the institutions that, after all, exist only for the sake of the collectivity of citizens we call society. For this reason, the issues discussed in this paper are intended to be seen as a starting point for consideration and discussion by Canadians. As the Criminal Law Review progresses and comes to grips with specific issues, the discussion will sharpen. If this paper helps in focusing those discussions and debates, if it offers a framework to which reference can be made, it will have served its purpose.

APPENDIX "A"

The Canadian Criminal Justice System: Jurisdiction and Institutions

Over the past century a multi-billion dollar network of police, court and correctional institutions has evolved to administer the criminal law, and no discussion of the context within which criminal law policy operates would be complete without reference to the criminal justice system administering that law. Because Canada is a federal state, with divided jurisdiction in the justice field, it is of vital importance to understand the complex jurisdictional and administrative arrangements that characterize the Canadian criminal justice system.

Divided Jurisdiction

If the general functions performed by governments can be classified within two categories — law-making and administration — then an initial reading of the British North America Act would seem to indicate that the Fathers of Confederation wished to divide those functions having to do with justice fairly clearly between the two orders of government.

Thus the federal Parliament has the authority to legislate with respect to "criminal law and procedure" under s. 91(27), while the provinces are given responsibility for the "administration of justice" under s. 92(14). This apparently clear-cut division of responsibilities is misleading, however, since the precise boundaries between these two broad areas of responsibility are often the subject of disputes before the courts and in federal-provincial discussions. The initial impression of clarity must also be modified in light of other provisions in the BNA Act which split jurisdiction over the operation of penal institutions, assigning responsibility for penitentiaries to the federal government, prisons to the provinces. The Criminal Code, confirming a practice predating Confederation, determined that offenders sentenced to terms of incarceration of two years or more would serve those sentences in penitentiaries, offenders given sentences of less than two years would serve them in prisons.

As for courts, the system is more unified than that of the United States, with both lower and higher-level courts in the provinces being established and administered

by the provinces. Even here, however, there is a division of responsibility, with the power of appointment of superior, district, and county court judges resting with the federal government.

This kind of sharing of jurisdiction is different from many other federal states. In the United States and Australia, for example, the individual states have the primary authority both to make and enforce criminal law, and the federal governments play a less central role. While there is little explicit historical evidence on the point, it is generally understood that the approach taken by the Fathers of Confederation was an attempt to create a unifying, nationally-applicable set of standards by giving the criminal law power to Ottawa. At the same time, flexibility and sensitivity to local and regional differences was built into the system by giving provincial governments the power to administer that law in the light of more local conditions and considerations.

A somewhat-closer look at the actual administrative functions carried out by the two orders of government reveals a complex set of relationships and institutions that requires further refinement of our understanding of the way in which the Canadian justice system operates in practice.

Provincial Responsibilities

Provincial governments, under their general responsibility for the administration of justice:

- provide the bulk of policing services, through municipal police forces in most provinces and also through provincial police forces in Ontario and Quebec. (In the other eight provinces, the two territories, and some 200 municipalities, the RCMP — a federal institution — carries out these policing functions under the terms of contractual agreements);
- carry out almost all prosecutions under the Criminal Code;
- establish, maintain and appoint judges for the provincial courts that hear the vast majority of criminal cases;
- deliver services to young offenders (recovering part of those costs from the federal government under the Canada Assistance Plan);
- maintain provincial prisons and services to offenders serving terms of less than two years;
- administer probation services, and provide other programs of a non-carceral nature, such as community service order programs, fine option programs, and the like; and
- in some provinces, provide separate parole authorities to serve inmates of provincial prisons.

Federal Responsibilities

The federal government, for its part:

- enacts criminal law in the Criminal Code or in other federal statutes;
- maintains the RCMP to enforce federal law other than the Criminal Code, and to provide contract services as described above;
- prosecutes offences under federal statutes other than the Criminal Code;
- appoints judges at the county, district and superior court levels;
- maintains some 60 federal penal institutions and the services provided to federal inmates;
- maintains the National Parole Board and parole services; and
- provides central research, investigative, information, and innovative facilities providing common benefits to federal and provincial agencies involved in the justice field.

Cost-Shared Programs

In addition, there are some services and programs that are cost-shared by the two levels of government, including:

- criminal legal aid services, provided by agencies administered independently of both orders of government and supported by federal-provincial cost-sharing agreements;
- compensation to victims of crime, provided in most provinces by independent agencies under federal-provincial cost-sharing agreements;
- justice information and statistics, through the newly-established Centre for Justice Statistics referred to earlier; and
- native courtworker services, also usually administered by independent native agencies and cost-shared by federal and provincial governments.

This complicated and fragmented justice system contains the potential for confusion, duplication and overlap, but recognition by both orders of government of the intimate linking of the components in a criminal justice system has led, especially in the past decade, to the development of close coordination and cooperation through a host of federal-provincial organizations at the level of Minister, Deputy Minister, and officials. Despite these efforts, a number of concerns continue to be expressed by both provincial and federal governments about the appropriate division of responsibilities in such areas as enforcement, prosecutions and corrections.

While in practice the system functions fairly well, it must be noted that the fragmentation of authority, both between and within levels of government, and through the important independent role of the judiciary, renders the possibility of a clear, internally-consistent and uniform criminal justice policy equally applicable to all components of the system a near impossibility. The important checks and balances that are an inherent part of the system's structure, and the crucial role played by independently-acting components, distinguish the justice system from many other spheres of public sector activity, which are organized in a relatively integrated "line" fashion and responsible to one ultimate authority. The fact that this is not the case is not necessarily a cause for complaint, since the idea that the ultimate coercive power of the state should be concentrated within one centre of responsibility would, in itself, be cause for concern. But the limited ability of the system to coordinate efforts and articulate a single, all-encompassing justice policy must be borne in mind.

APPENDIX "B"

The Canadian Criminal Justice System in Historical and Comparative Context

Introduction

This Appendix examines what is known in quantitative and comparative terms about crime and justice. It focuses on trends in national data from 1890 to 1980 for Canada, and compares those trends with similar data for Australia, England and Wales, France, Japan, the Netherlands and the U.S.A. The time period starts with the enactment of the present Criminal Code. The countries were selected because they are similar to Canada as economically advantaged societies, but have different rates of crime, social composition and prison use.

The data in the Appendix describe:

I. Data and Trends for Reported Crime

II. Processing and Attrition of Cases

III. Use and Nature of Imprisonment as a Sanction

IV. Criminal Justice System Expenditures and Employment

The data were taken from published sources, usually official government publications. However, to locate, understand or verify the data, a wide variety of different sources was used.

The Appendix is based on tables or charts which use rates per 100,000 total population. This rate allows for differences in absolute numbers that are due to differences in population over time or between countries. It is not always the ideal way of calculating a rate, but is adequate and easy to understand.

The difficulties and inherent limitations involved in both identifying accurate data and understanding their meaning over a ninety year period for seven different countries cannot be overestimated. Reliable, valid, and comparable data are available for only a very few aspects of crime and justice. In the face of these severe limitations, other data must be used to give an indication of the phenomena of interest, such as crimes known to police, court convictions, or average inmate populations. Use of data concerning "public order" offences or based on admis-

sions to prisons was abandoned, because the statistical definitions both in Canada and several of the selected countries are too vague.

The tables, charts or graphs prepared for each of the four sub-sections of this Appendix are found at the end of each sub-section.

I. Data and Trends for Reported Crime

Part II of the paper briefly described the rise in crime over the past several decades, as measured first by convictions in courts and, for the past two decades, by offences known to the police. That Part also referred to the analysis of the Ouimet Report, ascribing 98% of the rise in convictions between 1901 and 1965 to summary conviction offences, rather than the generally more serious indictable conviction offences, and 90% of the 98% to traffic offences resulting from the universal introduction of the automobile during this century.

As an accurate indicator of the actual extent of crime, reports to police are subject to a number of limitations, as is mentioned briefly in the text and extensively discussed in the literature.

One source of limitation is the fact that many offences do not come to the attention of police, for any number of reasons, and therefore cannot be recorded. Criminologists believe that a more accurate way to measure crime is by surveying the general public on a random selection basis — "victimization" surveys. Others believe that "self-report" surveys of potential offenders can provide valid estimates of criminal involvement. While results are not yet available for Canada, an intensive set of victimization surveys is being undertaken and analyzed by the federal government during 1982. Preliminary work done in Canada has confirmed findings from similar surveys in the United States, England-Wales, Australia, and the Netherlands. In Canada, it would appear that only two out of three break-and-enters, and one in two assaults, are actually reported to police. Similarly, findings in the U.S.A. indicate that more than one-half of most conventional crime is not reported to police.

Despite the limitations inherent in data based on offences reported to police, such data are available for most of the selected countries since the early 1960s. Furthermore, because of the absence of conviction data in Canada for the past decade, it would be impossible to discuss the Canadian situation since then without referring to "reported offence" data.

Table I displays the total range of reported offences for 1970, 1975 and 1980. In 1980, approximately one-quarter of the 2.7 million offences known to police involved offences outside the Criminal Code, but instead found in other federal statutes such as the Narcotic Control Act or the Food and Drugs Act, or in various provincial statutes or municipal by-laws. The percentage of Criminal Code offences in the total has grown from 70% in 1970 to 76% in 1980. It should be

noted that the huge number of traffic offences is not included in these figures. Over the decade 1970-1980, the rate of property crimes increased by 60%, while the rate of violent offences, including robbery, rose somewhat less. Violent crimes continued to account for less than 10% of the total number of offences reported to police. The table also shows a steady growth in most property crimes over the decade. Rates of violent crime, on the other hand, are not so consistent, with the growth in such crimes as robbery and wounding appearing to have levelled off between 1975 and 1980, after increasing significantly between 1970 and 1975. The murder rate has actually declined since 1975.

Figure A contrasts the actual situation in respect of violent crime with the apparent perceptions of the public in this regard. The first diagram displays in a pie chart the breakdown of total reported offences into various categories, using Table 1 as the basis, and highlights the proportion of violent crimes as a percentage of the total. A Gallup national omnibus survey carried out in February 1982 asked 2099 adult Canadians the following question: "In your opinion, of every 100 crimes committed in Canada, what percent involve violence — for example, where the victim was beaten up, raped, robbed at gun point, and so on?" As the second pie diagram illustrates, the average response to this question indicated that most Canadians thought more than half of all crimes involved violence, as opposed to the actual figure of less than one in ten.

Table 2 shows the offences reported to police for 1980, in descending order of frequency. More than seven out of every ten offences relate to a handful of sections of the Criminal Code, concerned with the property crimes of theft, break-and-enter, and wilful damage.

Table 3 indicates the trends with respect to serious traffic offences over the past two decades, with the bulk of the enormous growth accounted for by impaired driving, and failure to stop or remain at the scene of an accident.

Tables 4 through 7 consider the phenomenon of crime in a comparative context, as opposed to solely within Canada. In considering trends over time with respect to some selected offences, it should again be stressed that comparisons of the absolute rates of crime between countries must be undertaken very cautiously, because of differences in crime recording based on differences in reporting behaviour by the public, police recording practices, definitions of offences, and cultural factors. The trends in police crime data, on the other hand, are likely a fairly reasonable indicator of trends in actual crime, because police recording technology and practice in the selected countries has remained relatively constant over the last fifteen years for most major cities in the selected countries. Also, U.S. surveys of the general public suggest that reporting of crime to police has remained constant over this time period, and comparisons of trends in survey data with police data over this period indicate similar types of increase.

In general, these tables indicate that Canada is still considerably less violent than the U.S.A., but has become more violent than Japan, and (except for murder) most of the other countries.

The data on murder are likely the most reliable, and indicate that Canada is less violent than the other countries, with the exception of Japan and England-Wales. Rape rates are notoriously unreliable, but on the basis of Table 5, only U.S.A. reports more rape than Canada. The same pattern applies to robbery, although it must be noted that definitions of the offence vary from country to country. Burglary rates are surprisingly similar from one country to another, and are uniformly much higher than reported rates for the other crimes compared. For all four offences, the trends have been for the rate of reported crime to increase, Japan excepted. The overall rate of increases has also been roughly comparable between countries.

TABLE I

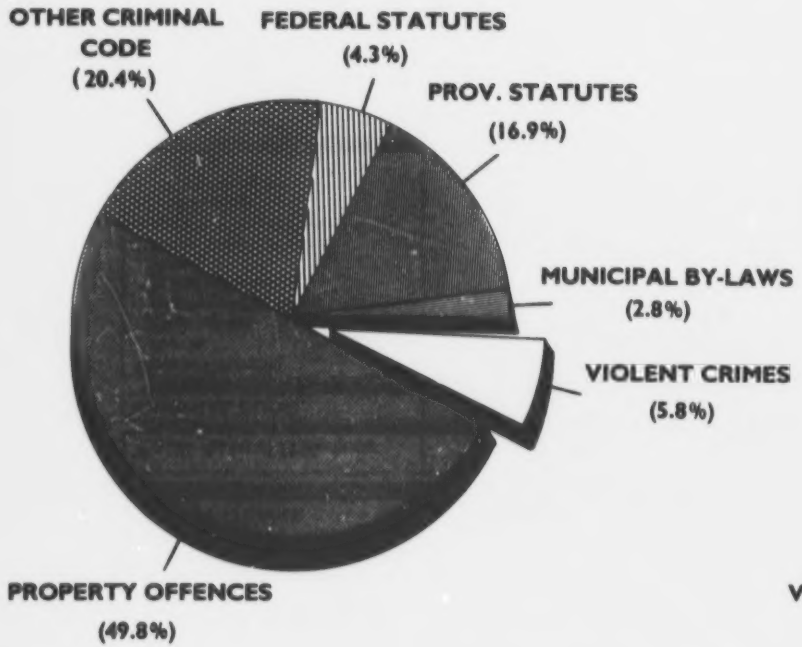
ACTUAL OFFENCES KNOWN TO POLICE BY TYPE OF OFFENCES WITH RATES PER 100,000 TOTAL POPULATION: CANADA: 1970, 1975 AND 1980

Type of Offence	1970 Number	1970 Rate	1975 Number	1975 Rate	1980 Number	1980 Rate
Total Actual Offences	**1,574,145**	**7,391.4**	**2,132,507**	**9,395.5**	**2,692,159**	**11,257.7**
CRIMINAL CODE	1,109,988	5,211.9	1,585,805	6,986.9	2,045,399	8,553.1
Violent Offences	102,358	408.6	135,424	596.7	155,864	651.8
Murder	430	2.0	633	2.8	493	2.1
Manslaughter	34	0.1	63	0.3	97	0.4
Attempted Murder	260	1.2	642	2.8	792	3.3
Sexual Offences	11,025	51.8	10,900	48.0	12,787	53.5
Rape	1,079	5.1	1,848	8.1	2,315	9.7
Other Sexual Offences	9,946	46.7	9,052	39.9	10,472	43.8
Assaults (Not Indecent)	78,979	370.8	101,886	448.9	117,111	489.7
Wounding	1,641	7.7	2,128	9.4	2,407	10.1
Other Assaults[a]	77,338	363.1	99,758	439.5	114,704	479.7
Robbery	11,630	54.6	21,299	93.8	24,581	102.8
Property Offences	748,519	3,514.7	1,041,036	4,586.7	1,334,619	5,580.9
Breaking & Entering	177,712	834.4	260,652	1,148.4	349,694	1,462.3
Theft-Motor Vehicle	62,805	294.9	90,791	400.0	93,928	392.8
Theft-Over $200[b]	150,010	704.4	94,957	418.4	224,595	940.0
Theft-$200 & Under[b]	278,765	1,308.9	492,372	2,169.3	539,490	2,256.0
Stolen Goods	11,956	56.1	16,240	71.6	24,657	103.1
Frauds	67,271	315.9	86,024	379.0	102,255	427.6
Other Criminal Code	256,572	1,204.7	409,345	1,803.5	554,916	2,320.5
FEDERAL STATUTES	55,283	259.6	100,514	442.9	115,023	481.0
Drugs	18,789	88.2	55,542	244.7	69,434	290.3
Other	36,494	171.4	44,972	198.1	45,589	190.6
PROVINCIAL STATUTES	335,788	1,576.7	381,388	1,680.3	452,812	1,893.5
MUNICIPAL BY-LAWS	73,086	343.2	64,800	285.5	74,163	310.1

Note: a. Assaults were not classified "other assaults" in 1970.
b. In 1970 theft was classified over/under $50.

FIGURE A

ACTUAL OFFENCES KNOWN TO POLICE
CANADA 1980 (IN PERCENT)



PUBLIC PERCEPTION OF VIOLENT CRIME
CANADA GALLUP SURVEY 1982 (IN PERCENT)

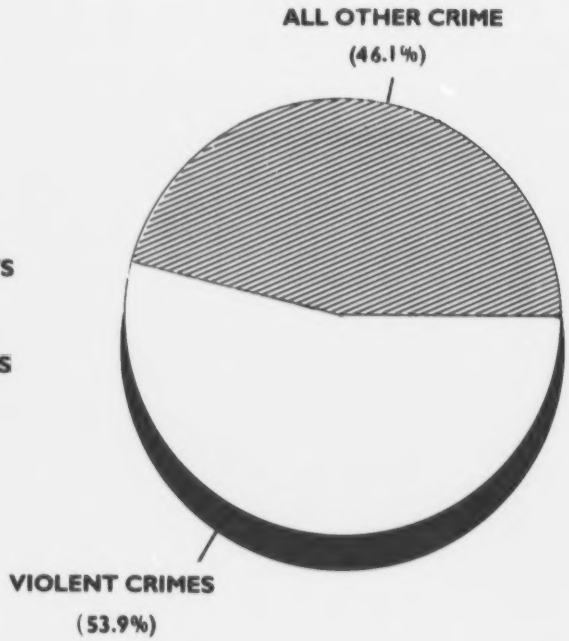


TABLE 2

ACTUAL OFFENCES KNOWN TO THE POLICE IN ORDER OF FREQUENCY OF PRINCIPAL SUB-SECTIONS IN THE CRIMINAL CODE INDICATED IN PARENTHESES: CANADA: 1980

	Sub-group number	Actual number	%	Cumulative %
1. Theft - $200 and under (294(b)**)		539,490	26.38	26.38
Bicycles	120,208			
From motor vehicles	151,774			
Shoplifting	76,556			
Others (includes 290,292,287(1),(2))	190,952			
2. Wilful damage (387, 388**)		318,211	15.56	41.94
Private	281,341			
Public	36,870			
3. Theft - over $200 (294 (a)*)		224,595	10.98	52.92
Bicycles	8,225			
From motor vehicles	109,247			
Shoplifting	4,399			
Others (includes 290, 292, 287)	102,724			
4. Breaking and entering: residence (306(1)(d)*)		209,565	10.25	63.17
5. Breaking and entering: business premises (306(1)(e)*)		99,041	4.84	68.01
6. Theft - motor vehicles (295***)		93,928	4.59	72.6
Automobiles	61,845			
Trucks	17,140			
Motorcycles	9,662			
Others	5,281			
7. Assaults (245(1)**, 246(1)*, 246 (2)(b)**, 246 (2)(e)**) (common assault, assault with intent, assault to prevent arrest)		80,896	3.96	76.56
8. Frauds (314(1)(b), 315*) (cheques, credit cards)		75,335	3.68	80.24
9. Disturbing the peace (171***)		43,975	2.15	82.39

	Sub-group Number	Actual Number	%	Cumulative %
10. Breaking and entering (others) (306, 307*)		41,088	2.01	84.40
11. Bail violation (133(2),(3),(4) and (5)**)		29,132	1.42	85.82
12. Bodily harm (assault) (228*, 229*, 230*, 231*, 232*, 245**)		27,688	1.35	87.17
13. Frauds (others) (296, 301.1(1)*, 320**, 323*, 324, 326*, 327*, 328*, 332*, 329*; 333*, 330*, 331*, 334*, 335*, 336*, 338** to 348* (incl.), 350*, 351**, 352*, 354*, 355* to 360* (incl.), 361*, 362**, 363*, 364* to 371** (incl.))		26,920	1.32	88.49
14. Have stolen goods (312**, 313**)		24,657	1.21	89.70
15. Robberies (302 (d)*)		13,357	0.65	90.35
Firearms	8,594			
Other offensive weapons	4,763			
16. Offensive weapons (others) (76.3(1)*, 83*, 84**, 85*, 86***, 87**, 88**, 95**, 102**)		11,522	0.56	90.91
17. Indecent acts (169, 170***)		11,429	0.56	91.47
18. Robberies (others) (302, 304*)		11,224	0.55	92.02
19. Trespass at night (173***)		10,185	0.50	92.52
20. Arson (389(1), 389(2), 390, 392*)		9,379	0.46	92.98
21. Indecent assault-female (149*)		6,535	0.32	93.30
22. Assaults (246.2(a) and (c)**)		6,120	0.30	93.60
Police	5,478			
Other peace-public officers	642			
23. Obstruct public peace officers (118**, 184, 405(2)***)		5,857	0.29	93.89
24. Prisoner unlawfully at large (133(1)(b)*)		2,972	0.15	94.04
25. Sexual offences (others) (146, 146 (2), 148, 150(1), 150(3), 151, 152, 153(1)(a), 153, 154, 155, 157*)		2,623	0.13	94.17
26. Escape custody (133(1)(a)*)		2,483	0.12	94.29
27. Wounding (assault) (228 (a), (b) and (c)*)		2,407	0.12	94.41
28. Rape (143, 145*)		2,315	0.11	94.52

	Sub-group Number	Actual Number	%	Cumulative %
29. Prohibited weapons (89, 90**)		2,166	0.11	94.63
30. Gaming and betting (185**)		2,007	0.10	94.73
Betting house	635			
Gaming house	1,372			
31. Restricted weapons (91 to 94 (incl.), 96**)		1,812	0.09	94.82
32. Prostitution		1,504	0.07	94.89
Bawdy House (193**, 194***)	442			
Procuring (195, 166, 167*)	153			
Others (195.1*)	909			
33. Counterfeiting currency (407* to 412** (incl.))		1,352	0.07	94.96
34. Indecent assault - male (156*)		1,314	0.06	95.02
35. Public morals (159**, 162 to 168 (incl.)*, 165**)		958	0.05	95.07
36. Attempted murder (222*)		792	0.04	95.11
37. Kidnapping (247*)		689	0.03	95.14
38. Gaming and betting (others) (186*, 187*, 189**, 191*, 192*)		688	0.03	95.17
39. Homicide *		593	0.03	95.20
Murder 1st degree (214)	225			
Murder 2nd degree (214)	268			
Manslaughter (217)	97			
Infanticide (216)	3			
40. Explosives (76.3 (1), 78, 79, 80*)		438	0.02	95.22
Other criminal code offences		98,157	4.80	100
Total Criminal Code Offences		2,045,399	100	100
Note: * Indictable ** Indictable or summary *** Summary				

TABLE 3

RATES OF SERIOUS TRAFFIC OFFENCES KNOWN TO POLICE PER 100,000 TOTAL POPULATION: CANADA: 1962, 1970 AND RECENT YEAR

	1962	1970	1980
Criminal Code	339.4	669.0	1,260.4
Criminal negligence			
causing death	0.9	0.8	1.3
causing bodily harm	0.5	0.4	0.8
operating motor vehicle	2.1	1.8	4.3
Failing to stop or remain at scene of accident	106.7	218.3	396.7
Dangerous driving	15.9	24.6	33.4
Failure or refusal to provide breath sample		19.2	68.6
Driving while intoxicated	20.3		
Driving while impaired	155.5	359.7	639.0
Driving while disqualified	37.6	44.2	124.6
Provincial statutes		310.1	666.3[a]
Failing to stop or remain at scene of accident		79.4	324.6
Dangerous driving		244.0	301.7
Driving while disqualified		6.7	37.2[b]

a. approximate based on 37.2 driving while disqualified for 1978

b. for 1978

TABLE 4

RATES OF MURDERS RECORDED BY POLICE PER 100,000 TOTAL POPULATION: SELECTED COUNTRIES: 1960-1980

	Canada	Australia	England-Wales	France	Japan	Netherlands	U.S.A.
1960	0.9				2.8	2.6	5.1
1961	1.2				2.8		4.8
1962	1.4				2.5		4.6
1963	1.3	3.7			2.4		4.6
1964	1.3	4.1			2.4		4.9
1965	1.4	4.6	0.6		2.3	3.1	5.1
1966	1.2	3.9	0.7		2.2		5.6
1967	1.7	3.9	0.8		2.1		6.2
1968	1.8	4.0	0.8		2.2		6.9
1969	1.8	3.6	0.8		2.0		7.3
1970	2.2	3.9	0.8		1.9	4.2	7.9
1971	2.2	3.7	0.9		1.8	4.7	8.6
1972	2.4	4.2	1.0	2.3	1.9	5.5	9.0
1973	2.5	4.3	1.0	2.4	1.9	6.7	9.4
1974	2.7	4.1	1.2	2.7	1.7	7.1	9.8
1975	3.1	4.4	1.1	2.8	1.9	7.3	9.6
1976	2.9	3.9	1.2	3.0	1.9	8.9	8.8
1977	3.0	3.6	1.0	3.4	1.8	8.3	8.8
1978	2.8	4.0	1.1	3.2	1.6	8.0	9.0
1979	2.7	5.4	1.3	3.6	1.6		9.7
1980	2.5			3.9			10.2

Definitions: Canada: murder and manslaughter. **Australia:** murder, attempted murder, manslaughter (manslaughter arising from motor traffic accidents for some states from 1973-74 has been included). **England-Wales:** murder, manslaughter and infanticide. **France:** meurtres liés au profit (meurtres crapuleux, règlements de compte) et meurtres non-liés au profit (homicide ordinaire). **Japan:** homicide. **Netherlands:** murder and manslaughter. **U.S.A.:** murder and non-negligent manslaughter.

TABLE 5

RATES OF RAPES RECORDED BY POLICE PER 100,000 TOTAL POPULATION: SELECTED COUNTRIES: 1960-1980

	Canada	Australia	England-Wales	France	Japan	Netherlands	U.S.A.
1960	1.4				6.8		9.6
1961	2.5				6.9		9.4
1962	3.1				6.4		9.4
1963	2.9				6.5		9.4
1964	3.9	3.0			7.1		11.2
1965	3.3	3.2			6.8		12.1
1966	3.2	3.3			6.7		13.2
1967	3.8	2.8			6.4		14.0
1968	4.3	3.7			6.1		15.9
1969	4.9	3.9	1.8		5.5		18.5
1970	5.1	3.8	1.8		5.0		18.7
1971	5.7	4.3	1.6		4.6		20.5
1972	5.9	4.9	1.8		4.4		22.5
1973	7.2	4.7	2.0		3.8		24.5
1974	8.2	5.5	2.1		3.6		26.2
1975	8.1	5.4	2.1		3.3		26.3
1976	8.0	5.7	2.2		2.9		26.4
1977	8.1	6.3	2.1		2.6		29.1
1978	9.0	6.4	2.5		2.5		30.8
1979	9.7	5.9	2.4		2.4		34.5
1980	9.7			3.5			36.4

Definitions: Canada: rape. **Australia:** includes attempted rape and assault with intent to rape. **England-Wales:** rape and attempted rape. **U.S.A.:** forcible rape, attempts to commit forcible rape by force or threat of force are included.

TABLE 6

RATES OF ROBBERIES RECORDED BY POLICE PER 100,000 TOTAL POPULATION: SELECTED COUNTRIES: 1960-1980

	Canada	Australia	England-Wales	France	Japan	Netherlands	U.S.A.
1960	18.1				5.7		60.1
1961	21.0				4.8		58.3
1962	26.6				4.4		59.7
1963	31.1				4.2		61.8
1964	29.4	4.7			4.0		68.2
1965	28.4	5.3	7.8		4.0		71.7
1966	28.0	7.7	9.3		3.6		80.8
1967	35.4	8.2	9.4		3.0		102.8
1968	40.5	10.8	9.9		3.0		131.8
1969	47.8	13.7	12.4		2.7		148.4
1970	54.6	16.5	12.9	2.6	2.6		172.1
1971	52.1	21.8	15.3	3.5	2.3		188.0
1972	54.3	23.3	18.2	3.5	2.3		180.7
1973	59.7	21.4	14.9	5.0	1.8		183.1
1974	75.8	24.1	17.6	5.0	1.9		209.3
1975	93.8	20.8	23.0	6.7	2.1		218.2
1976	87.2	20.1	23.6	7.2	1.9		195.8
1977	83.8	21.1	28.0	8.6	1.8		187.1
1978	83.8	24.9	26.8	8.9	1.7		191.3
1979	88.3	25.5	25.4	9.4	1.8		212.1
1980	102.7			9.0			243.5

Definitions: Canada: firearms, other offensive weapons, other robbery. **Australia:** use or threat to use violence to obtain property including attempts. **England-Wales:** robbery and assault with intent to rob. **France:** hold-up et autres vols à main armée **U.S.A.:** use or threat to use violence to obtain property including attempts.

TABLE 7

RATES OF BURGLARIES RECORDED BY POLICE PER 100,000 TOTAL POPULATION: SELECTED COUNTRIES: 1960-1980

	Canada	Australia	England-Wales	France	Japan	Netherlands	U.S.A.
1960	280.4					73.2	508.6
1961	393.0		357.4				518.9
1962	441.8		412.1				535.2
1963	497.9		466.0				576.4
1964	504.0	374.2	493.5				634.7
1965	491.4	409.3	529.1			131.3	662.7
1966	500.6	452.8	574.0				721.0
1967	585.9	486.9	548.7				826.6
1968	699.9	499.8	588.7				932.3
1969	769.9	577.6	861.8				984.1
1970	834.4	639.0	884.4			334.7	1,084.9
1971	873.8	750.4	926.3			435.1	1,163.5
1972	875.8	944.2	894.9	286.5		492.2	1,140.8
1973	898.4	948.0	799.5	302.9		522.8	1,222.5
1974	1,043.5	884.2	983.5	342.8		699.0	1,437.7
1975	972.2	919.6	1,060.3	376.4		736.8	1,525.9
1976	1,167.0	894.7	1,048.0	337.4		822.9	1,439.4
1977	1,163.7	914.3	1,229.8	379.6		874.1	1,410.9
1978	1,186.2	983.5	1,151.1	378.1		904.9	1,423.7
1979	1,252.3	1,120.7	1,116.8	437.2			1,499.1
1980	1,450.3			499.9			1,668.2

Definitions: Canada: breaking and entering (in all kinds of buildings). **Australia:** break and enter. **England-Wales:** burglary in a dwelling, aggravated burglary in a dwelling, burglary in a building other than a dwelling, aggravated burglary in other, and going equipped for stealing = Total burglary. **France:** cambriolages de tous genres de lieux. **U.S.A.:** burglary.

II. Processing and Attrition of Cases

Few policy-makers or citizens think of the extent to which crime is handled by citizens, police and lawyers away from the formal rules of the courtroom. However, comprehensive studies which have looked at the reaction of citizens to crime, and at how police and courts deal with crime reports, have brought a realization that:

- much crime is not known to the police;
- only a portion of crime known to the police becomes the subject of a charge or arrest;
- many charges are dropped or withdrawn before trial; and
- while most cases actually reaching the trial stage result in a conviction, the vast majority of convictions results from a guilty plea.

Chart B illustrates this process of "attrition" of events through the various stages of the criminal justice system, using the offence of break-and-enter as an example. As is shown, more offences are committed than are known to police; more are known to police than result in an actual charge being laid; and more charges are laid than convictions entered.

Table 8 compares "attrition" rates between countries for robbery and burglary, showing the fairly comparable rates of attrition between the "reported offence" and "charge laid" stages. England-Wales has a higher ratio for robbery than all other countries except Japan. In both Japan and the Netherlands, prosecutors have the formal authority to decide whether a particular prosecution should or should not be proceeded with, in the public interest. As a result of the presence of police, and sometimes probation officers or victims at hearings to decide on this point, it is understood that police get to know when prosecutors would be unlikely to prosecute, and consequently are less likely to record such offences. This helps explain both the high ratio of charges to offences, and the comparatively low rate of offences. As for the ratios generally, it cannot be determined from the available data what proportion of the "attrition" is due to inability to identify an accused, and how much is due to the exercise of informal police or prosecutorial discretion. Figure C displays the data contained in Table 8 in graphic form.

Tables 9 and 10 demonstrate the large growth in convictions in Canada for both indictable and summary offences during this century. As is mentioned in the text, the vast bulk of the increase is found in summary conviction offences and, in the indictable category, for non-violent property crimes. Consideration of these tables in the light of Chart B and Table 8 reinforces the point that much of the "law in action" is a comparatively low visibility phenomenon, only indirectly and marginally subject to the control of statute or court decisions.

Figure D illustrates in graphic form the conviction rates over time for murder, robbery and burglary. This figure is based on the data contained in Table 10.

Table 11 illustrates a parallel phenomenon in Australia, England-Wales, and France, broken down according to whether an indictable procedure, or a more simplified procedure (usually employed for less serious offences) was used.

CHART B

ATTRITION OF EVENTS THROUGH THE CRIMINAL JUSTICE SYSTEM

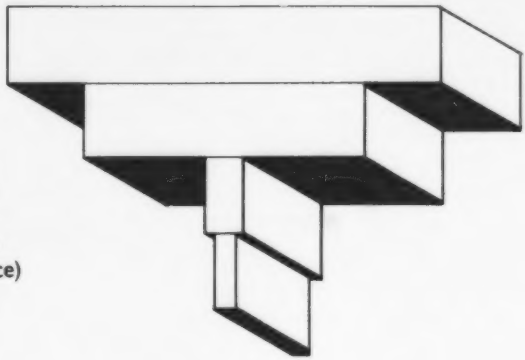
This diagram illustrates the processing of individual crime victim's cases through three major stages in the criminal justice system. As nationwide data do not exist on victimization for any offences, the rates were estimated for break and enter as it is a relatively frequent serious offence for which studies have been undertaken in British Columbia and Ontario. These rates may differ for other jurisdictions within Canada. The differing widths of the graph indicate the relative volume of offences handled at different points in the system.

All break and enters (estimated by survey of victims)

3/5 of all break and enters are reported to police

1/10 of all break and enters are eventually cleared by charge (1/6 of all reported to police)

1/17 of all break and enters result in convictions (3/5 of all cleared by charge)



Data are not available which permit an assessment of the proportion of convictions resulting in sentences of imprisonment. However, it appears that 2/5 of offenders convicted of break and enter receive such sentences.

The final disposition of an offence or offender lies at the end of a long chain of decisions made by victims, police, prosecutors, and judges.

The result of this chain of decisions is that relatively few cases result in conviction and relatively few offenders are imprisoned in comparison with the total number of offences committed, even for a relatively serious offence such as break and enter.

The greatest volume of cases are affected by decisions made early in the process by victims, police and prosecutors.

The rate of commission of offences in our society is quite high. Canadian studies in which juveniles reported offences which they had committed indicate that 60 to 90% of all juveniles commit at least one offence in a given year (many of them admittedly minor). Research in the U.S. suggests that similar findings may hold for adults as well.

TABLE 8

PERSONS CHARGED AS RATIO OF OFFENCES KNOWN FOR ROBBERY AND BURGLARY PER 100,000 TOTAL POPULATION: SELECTED COUNTRIES: RECENT YEAR

	ROBBERY			BURGLARY		
	A offences known	B persons charged	A:B	A offences known	B persons charged	A:B
Canada[a] 1973	91.9	29.4	1:0.3	1,382.0	160.6	1:0.1
Australia 1979	25.5	8.3	1:0.3	1,123.2	138.5	1:0.1
England-Wales 1979	25.4	14.0	1:0.6	1,116.8	157.2	1:0.1
France 1980	9.0	2.8	1:0.3	512.0	81.8	1:0.2
Japan 1979	1.8	1.6	1:0.8			
Netherlands[b]						
U.S.A. 1977	187.1	56.6	1:0.3	1,410.9	210.0	1:0.2

Note: One person can be charged for more than one crime and vice versa.

a. Alberta and Quebec are excluded.
b. For the Netherlands, there was a rate of 4,450.1 offences and 1,402.8 charges for all offences in 1979, ratio 1:0.3.

FIGURE C

PERSONS CHARGED TO OFFENCES KNOWN

Robbery and Burglary: Selected Countries

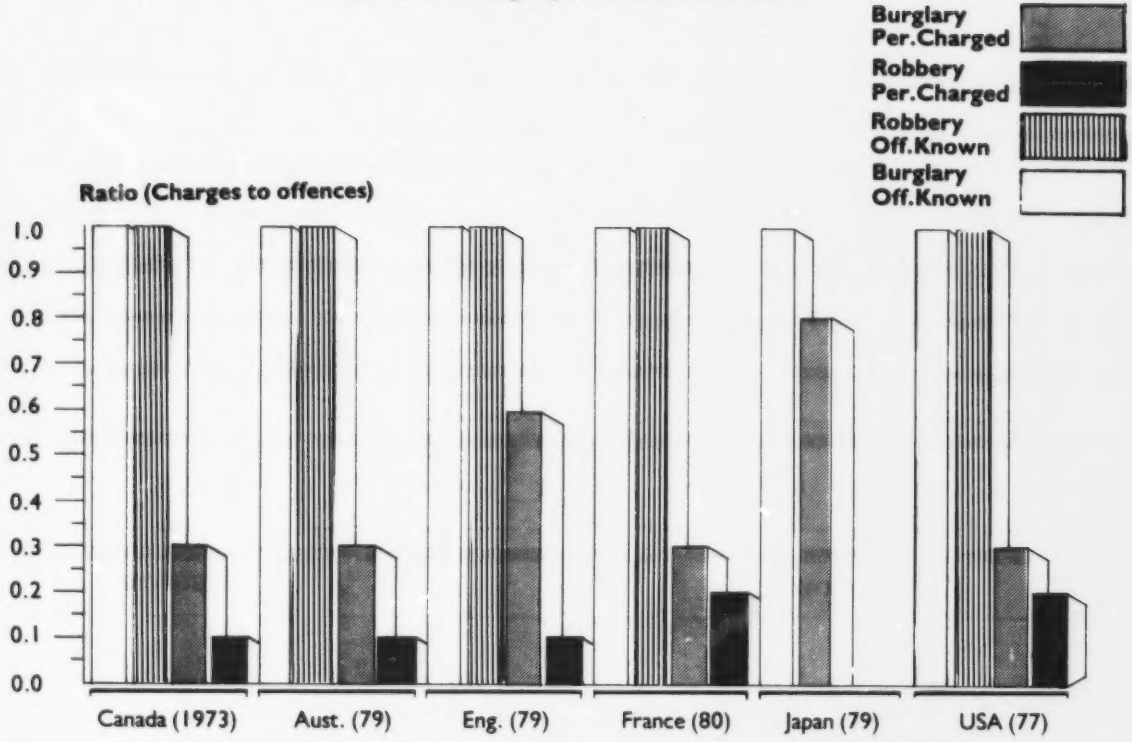


TABLE 9

CONVICTIONS FOR INDICTABLE AND SUMMARY OFFENCES, OF PERSONS AGED 16 YEARS AND OVER, WITH RATES PER 100,000 TOTAL POPULATION: CANADA: 1890 TO 1973

	Indictable Offences[a,b]		Summary Offences[a,c]	
Year	Number of convictions[c]	Rate	Number of convictions	Rate
1890	3,340	69.9	34,606	724.1
1900	4,853	91.6	35,885	676.9
1910	10,327	147.8	91,203	1,305.1
1920	15,088	176.3	138,424	1,617.9
1930	28,457	278.8	308,759	3,024.7
1940	46,723	410.5	456,109	4,007.6
1950	42,624	310.9	1,183,991	8,634.7
1960	64,707	362.1	1,106,532	6,192.1
1970	75,334	544.2	1,451,943	10,488.6
1973[d]	72,430	505.5	1,384,017	9,658.4

Note: a. Alberta and Quebec are excluded for 1970 and 1973. Figures before 1951 do not include Newfoundland.

b. Until 1948 the basis of the statistics of indictable crime was the offence and figures for number of persons convicted were not available on a satisfactory basis. Data for 1950 to 1970 for number of persons convicted for indictable offences are as follows:

	Number of persons	Rate
1950	31,385	228.9
1960	35,443	198.3
1970	45,880	215.8

c. Summary offences includes juveniles, but excludes parking.

d. After 1973 figures for convictions for indictable offences are not collected.

TABLE 10

CONVICTIONS OF PERSONS AGED 16 AND OVER FOR SELECTED INDICTABLE OFFENCES WITH RATE PER 100,000 TOTAL POPULATION: CANADA: 1890-1980

	Murder		Rape		Robbery		Burglary	
Year	Number of Convictions	Rate	No.	Rate	No.	Rate	No.	Rate
1890	28	0.6			42	0.9	234	4.9
1900	21	0.4			85	1.6	322	6.1
1910	49	0.7			99	1.4	844	12.1
1920	69	0.8			237	2.8	2,073	24.2
1930	68	0.7			435	4.3	4,212	41.3
1940	60[a]	0.5	26[a]	0.2	541	4.8	6,136	53.9
1950	103	0.8	37	0.3	776	5.7	7,295	53.2
1960	61	0.3	55	0.3	1,239	6.9	13,445	75.2
1970[b]	108	0.8	43	0.3	1,021	7.4	12,241	88.4
1980[c]								

Note: a. For 1941.
b. Excludes Alberta and Quebec.
c. Conviction data not available for 1980.

FIGURE D

CONVICTIONS OF PERSONS AGED 16 AND OVER
CANADA: SELECTED INDICTABLE OFFENCES: RATE PER 100,000

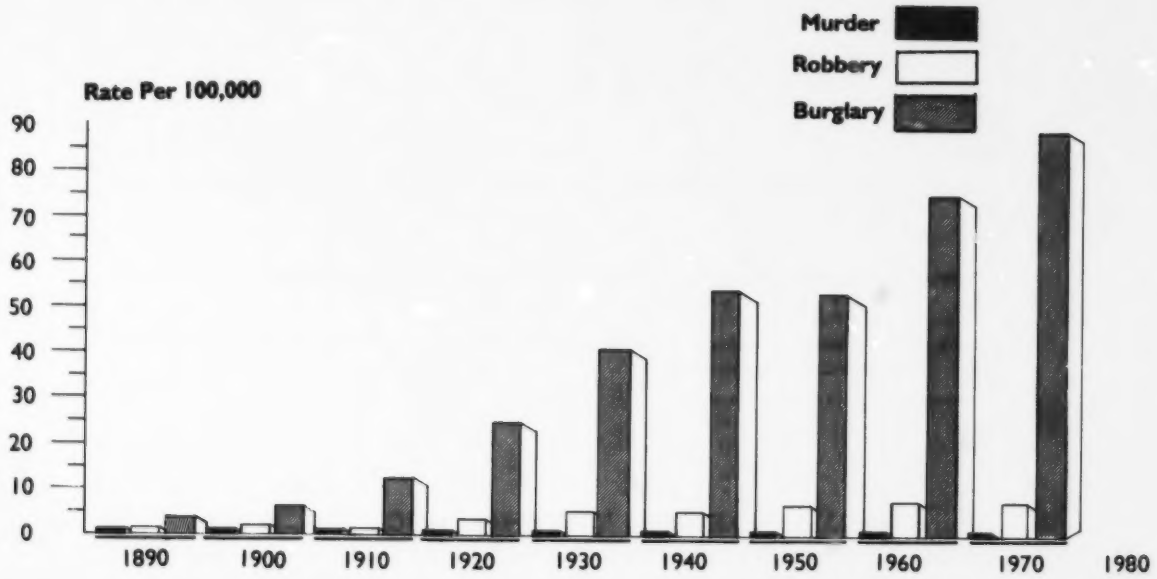


TABLE 11

CONVICTIONS INVOLVING INDICTABLE AND SIMPLIFIED PROCEDURES WITH RATE PER 100,000 TOTAL POPULATION: SELECTED COUNTRIES: 1900, 1960, RECENT YEAR

		Indictable		Simplified Procedure	
Year		Number('000)	Rate	Number('000)	Rate
Canada	1900	4	91.6	35[a]	676.9
	1960	64	362.1	1,107	6,192.0
	1973	72	505.5	1,384	9,658.4
Australia	1900	13[b]	349.5	113[c]	3,016.4
	1960	65	642.1	671	6,538.5
	1971	130	1,010.5	853	6,600.5
England-Wales	1966	232[d]	484.4	1,213[e]	2,523.3
	1978	424	863.4	1,509	3,073.3
France[d]	1900	189[f]	492.1	441[g]	1,147.3
	1966	261	535.1	5,577	11,392.3
	1976	460	871.0	9,355	17,714.5

Note: a. Summary procedure.
b. Convictions against persons, property, forgery and currency.
c. Offences against good order and petty offenses.
d. Indictable, persons convicted.
e. Non-indictable, persons convicted.
f. Activité des tribunaux correctionelles. For 1900, persons convicted is used including Cours d'assises.
g. Activité des tribunaux de police. For 1900, persons convicted is used.

III. Use and Nature of Imprisonment

The two major measures of prison use are the number of persons in prison on an average day and the period of time each person spends in prison. Unfortunately, there are no reliable methods of measuring on a comparative basis the length of stay or its analogue, the number of admissions. Just as unemployment is measured by the rate of persons unemployed on an average day, so prison use will be indicated here by the 'static' or 'stock' measure of the average daily estimate of persons in adult prisons per 100,000 total population. This measures an average use of prison rather than the number of persons experiencing prison for varied time periods.

Table 12 indicates that fines continue to be the main alternative to incarceration, and by far the most common sanction awarded. Other alternatives to incarceration, and especially probation, have been introduced in recent years, but do not approach the use of fines for any category of offence. In 1973, the rate of probation varied from 67.0 for indictable offences, to 40.4 for motor vehicle offences, to 155.5 for other summary conviction offences. Over the century, the bulk of increased use of fines has been for motor vehicle violations, the fine rate for which was 7495.4 out of the total of 9269.9.

Canada has approximately one person in a thousand incarcerated on an average day in 1980 as in 1890, as shown in Table 13. These 23,000 persons are mainly young males. More than 3,000 are held before trial in prisons administered by the provinces. Another 10,000 are sentenced to provincial prisons and 10,000 sentenced to federal penitentiaries.

In Table 14, the property and personal crime indices are displayed by province and territory, as are the rates of persons held in adult prison. As may be seen, higher reported rates of crime are generally associated with higher incarceration rates.

In Table 15, incarceration use has been broken down by Canadian province or territory in terms of the change over the past decade. The rapid increase in use of incarceration in Saskatchewan and Newfoundland is offset nationally by the decrease in use in British Columbia. This geographic distribution is shown in Chart E. Basically, the further West and North one is in Canada the higher the violent crime rate, and the higher the incarceration rate.

Table 16 compares trends in prison use among the selected countries. The trends in Canada and France have remained relatively stable, while in the U.S.A. use of prisons has increased, and in Japan and the Netherlands it has decreased. The incarceration rate for England-Wales has risen in the past two decades, reversing an earlier decline. While the decline in the Netherlands has persisted over the century,there are recent indications that increases in violent crime may revise the trend marginally.

Table 17 breaks down the figures for incarcerated persons in the selected countries according to whether they are actually serving sentences of incarceration, or are held in custody before trial and sentence, as opposed to being free on bail, say. Chart F illustrates the relative rates graphically.

In Table 18, rates of probation and parole are shown to vary substantially from one country to another. There is a general tendency for there to be more persons on probation and parole when there are more persons in prison. This is confirmed both for the selected countries and over time. Within Canada, probation use has increased in some provinces to the point where Ontario, for instance, has four times as many persons on probation as it has incarcerated.

Table 19 attempts to reflect the phenomenon reported for Canada in Table 14 in a comparative context, in displaying the robbery, burglary and incarceration rates for the selected countries. Basically the same pattern is found to apply: higher robbery and burglary rates are associated with higher incarceration rates.

Table 20 compares the use made of imprisonment as a sanction for those convicted of robbery and theft in Canada between 1964 and 1973. The decline in use of imprisonment for theft continues a century-long trend, in that theft convictions in 1880 resulted in incarceration around 80% of the time, or four times the rate in 1973.

Table 21 reinforces the point made just above, in displaying the increasing proportion of the inmate population in federal penitentiaries who are serving sentences for crimes of violence, as opposed to property crimes. Figure G illustrates these data graphically. Also of interest is the decline in percentage of admissions for conviction for Criminal Code offences, as a result of the large increase in Narcotic Control Act convictions, and the introduction of parole in 1960, and mandatory supervision a decade later.

TABLE 12

TOTAL CONVICTIONS WITH SENTENCES PER 100,000 TOTAL POPULATION: CANADA: 1900 AND 1973

	1900		1973[b]	
	Number of Convictions	Rate	Number of Convictions	Rate
Total convictions	41,653[a]	785.8	1,462,714	9,755.1
Death	9	0.2	1	—
Penitentiaries	539	10.2	1,718	12.0
Reformatories	256	4.8	1,011	7.1
Fines or jail[c]	35,049	661.2	1,328,360	9,269.9
Various sentences[d]	4,130	77.9	91,602	639.2

Note:
a. Includes 1669 convictions in the Yukon for which no sentencing details are given.
b. Excludes Alberta and Quebec for both sentences and total population.
c. In 1973, the rates for jail and fines were 220.4 and 9,049.6 respectively. Fines and jail were not separated statistically in 1900.
d. Included in various sentences is probation, which was not used in 1900. However, in 1973 the rate was 262.9.

TABLE 13

PERSONS IN ADULT PRISONS AT YEAR END WITH RATES PER 100,000 POPULATION: CANADA: 1890 TO 1980

Incarceration

Year	Number of persons	Rate	Year	Number of persons	Rate
1890[a]	4,424	91.5	1955	15,059	95.9
1900	4,339	81.9	1960	16,240	96.5
1910			1965	20,097	102.3
1920			1970	19,233	90.3
1930	11,223	109.9	1975	19,860	87.5
1940	12,198	107.2	1980	22,94i	96.9
1950	13,655	99.6			

Note: General: 1955 to 1980 data are adults only.
1955 to 1980 data include penitentiaries, prisons, reformatories and some lock-ups.
1930 and 1940 data exclude lock-ups.
1891 and 1901 data exclude reformatories.

a. 1891

TABLE 14

RATES OF PROPERTY CRIME, VIOLENT CRIME AND PERSONS IN ADULT PRISONS PER 100,000 POPULATION: PROVINCE OF SENTENCE: 1978 AND 1980

Province	Population ('000) 1978	Property Crime[a] 1978	Violent Crime[b] 1978	Persons in adult prisons[c] 1980
1. Alberta	2,013	4,706.3	101.2	141.0
2. Manitoba	1,032	4,637.7	102.9	123.8[d]
3. Saskatchewan	959	4,060.1	62.7	123.4
4. British Columbia	2,569	6,190.9	128.6	111.6
5. Nova Scotia	847	2,991.5	59.2	99.2
6. New Brunswick	701	2,506.8	32.2	96.7
7. Ontario	8,502	4,333.7	75.6	86.7
8. Prince Edward Island	123	2,278.0	16.3	85.4[e]
9. Quebec	6,283	3,421.5	172.7	81.6
10. Newfoundland	573	2,386.5	19.5	73.7[f]
Northwest Territories	43	7,935.5	165.9	389.4
Yukon	22	9,433.1	147.5	304.0
CANADA	23,671	4,178.0	106.7	96.9

Note: a. Property crimes are offences of breaking and entering, theft of motor vehicle, theft over and under $200.

b. Violent crimes are offences of homicide, attempted murder, wounding, rape and robbery.

c. This combines persons held in prisons administered by the federal, provincial and municipal governments for each province. The federal portion of the rate is based on the number of inmates by province of residence at time of sentence.

d. Includes lock-ups.

e. Some lock-ups are included.

f. Counts are on register rather than actual counts.

TABLE 15

CHANGES IN RATES OF PERSONS IN ADULT PRISONS, PER 100,000 TOTAL POPULATION: PROVINCE OF SENTENCE: 1970 AND 1980

Province	1970	1980	Change
1. Alberta	127.8	141.0	13.2
2. Manitoba	103.7	123.8	20.1
3. Saskatchewan	78.2	123.4	45.2
4. British Columbia	145.6	111.6	-34.0
5. Nova Scotia	76.5	99.2	22.7
6. New Brunswick	77.2	96.7	19.5
7. Ontario	89.8	86.7	-3.1
8. Prince Edward Island	87.3	85.4	-1.9
9. Quebec	65.2	81.6	16.4
10. Newfoundland	42.8	73.7	30.9
Northwest Territories	242.4	389.4	147.0
Yukon	347.1	304.0	-43.1
CANADA	89.8	96.9	7.1

Note: Persons in adult prisons by province of sentence includes persons held in prisons administered by federal, provincial and municipal governments. For federal penitentiaries, rates are by province of residence at time of sentence.

CHART E

MAP OF CANADA SHOWING RATES OF PERSONS IN ADULT PRISONS PER 100,000 TOTAL POPULATION: GEOGRAPHIC REGIONS: 1980

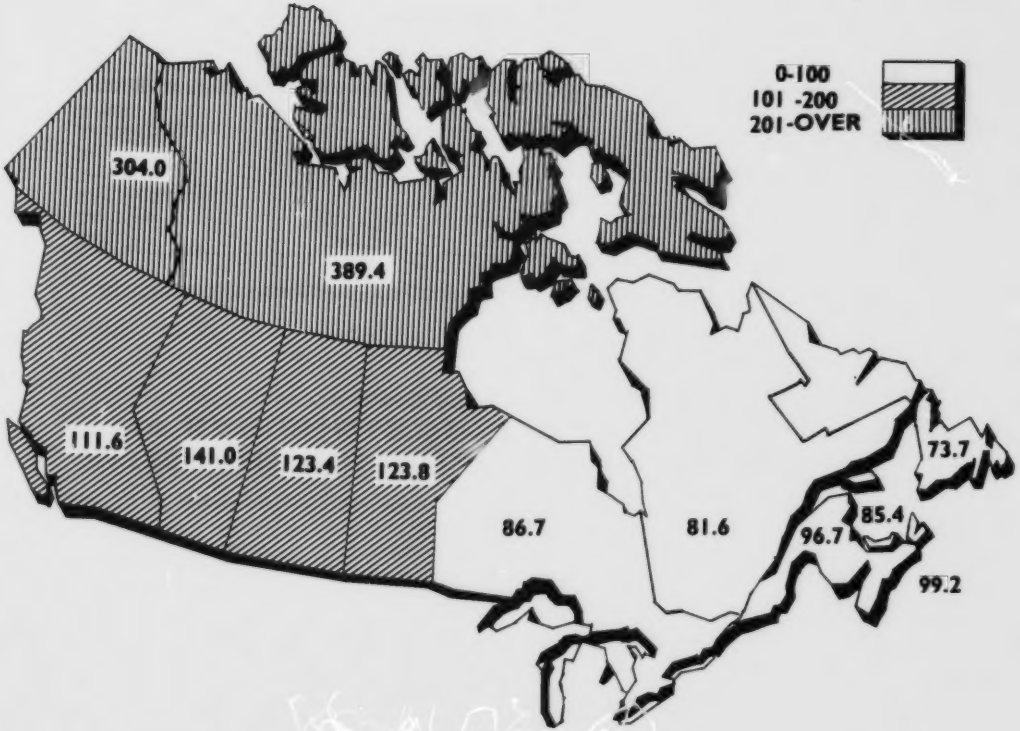


TABLE 16

RATES OF PERSONS IN ADULT PRISONS PER 100,000 TOTAL POPULATION: SELECTED COUNTRIES: 1900, 1960, 1970 AND RECENT YEAR

	1900	1960	1970	Recent Year
Canada	81.9	96.5	90.3	96.9 (1980)
Australia	52.9	77.9	90.0	63.3 (1980)
England-Wales	81.7	58.1	80.2	85.1 (1980)
France	64.9	61.6	59.5	66.7 (1980)
Japan	-	77.2	46.0	43.0 (1978)
Netherlands	143.3	28.3	17.7	24.6 (1978)
U.S.A.	128.8[a]	192.9	175.8	207.3 (1978)

Note: General: The estimate of average daily population is usually based on a calendar year or fiscal year end, or, census estimate.

a. 1890

TABLE 17

RATES OF PERSONS IN ADULT PRISONS WITH THOSE ON PRE-TRIAL DETENTION PER 100,000 TOTAL POPULATION: SELECTED COUNTRIES: 1978, 1979 AND 1980

	Year	Persons in adult prisons[a]	Pre-Trial Detention	Convicted
Canada	(1980)	96.9	12.4[b]	84.5
Australia	(1979)	67.4[c]	8.1	59.3
England-Wales	(1980)	85.1	9.0	76.1
France	(1980)	66.7	26.5	40.2
Japan	(1978)	43.0	7.8	35.2
Netherlands	(1978)	24.6	10.8	13.8
U.S.A.	(1978)	207.3	32.8	174.5

Note: General: Persons in adult prisons includes all persons incarcerated in federal, state, provincial or local jurisdictions. In most countries pre-trial detention means awaiting trial or unconvicted

a. Persons in adult prisons includes pre-trial detention i.e., for Canada, pre-trial rate is 12.4, post-trial rate is 84.5 and persons in adult prison rate is 96.9.

b. Pre-trial detention means awaiting trial and awaiting sentence.

c. Prisoners exclude persons held in police cells or lock-ups which are mostly pre-trial.

CHART F

RATES OF PERSONS IN ADULT PRISONS WITH RATES PRE-TRIAL, PER 100,000 TOTAL POPULATION: SELECTED COUNTRIES: RECENT YEAR

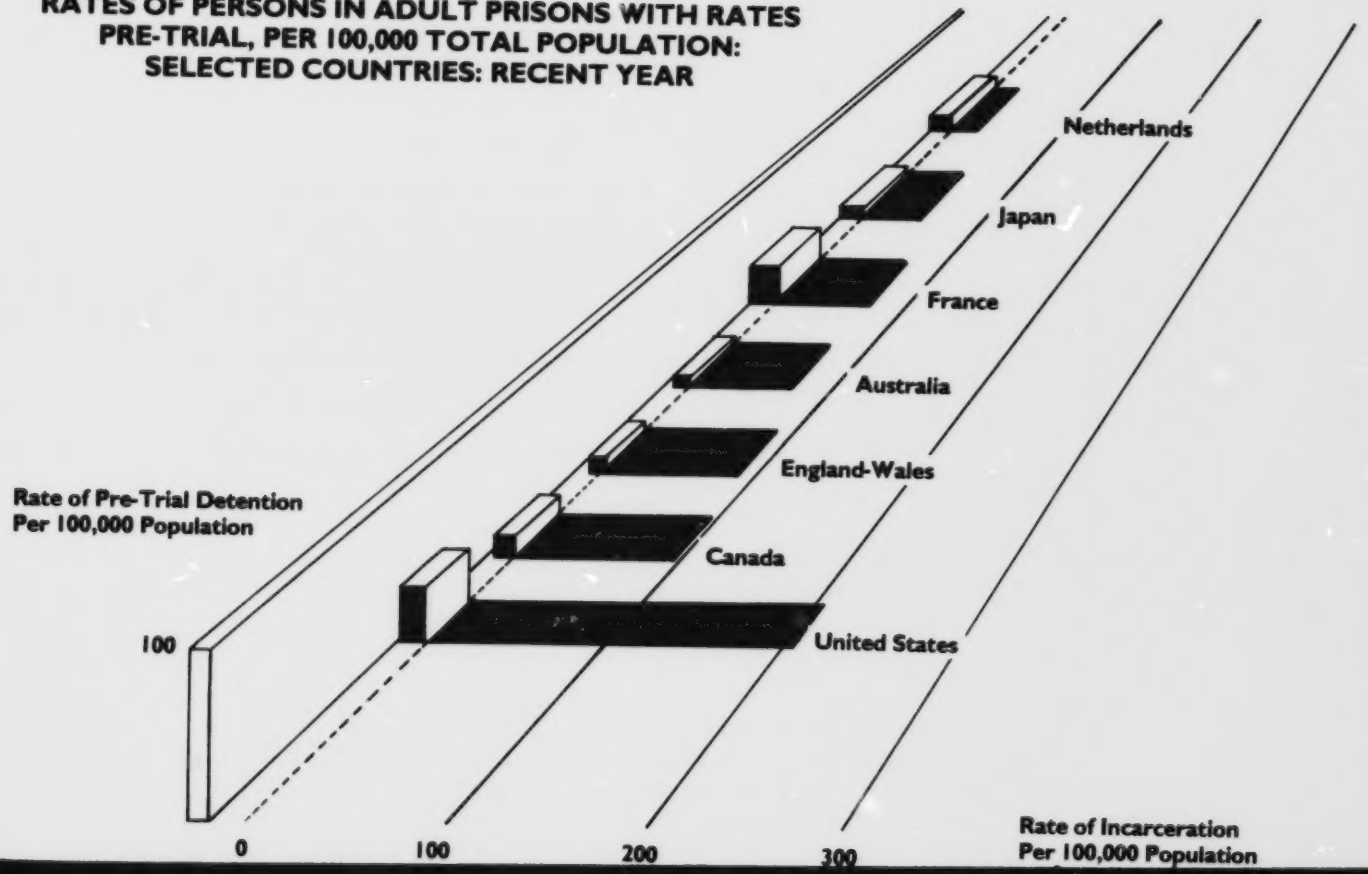


TABLE 18

RATES OF PERSONS IN ADULT PRISONS, ON PROBATION AND PAROLE PER 100,000 TOTAL POPULATION: SELECTED COUNTRIES: RECENT YEAR

	Persons in adult prisons[a]		Probation[a]		Parole[a]	
Canada	96.9	(1980)	241.2	(1980)	28.6	(1980)
Australia	67.4	(1979)	137.0	(1978)	29.8	(1978)
England-Wales	85.1	(1980)	149.8	(1978)	64.0	(1978)
France	66.7	(1980)	124.6	(1979)	8.8	(1979)
Japan	43.0	(1978)	19.2	(1976)	5.7	(1976)
Netherlands[b]	24.6	(1978)				
U.S.A.	207.3	(1978)	444.0	(1976)	79.4	(1976)

Note: a. average daily estimate.
b. probation or parole data are not available as data are calculated by admissions rather than average day.

TABLE 19

RATES OF BURGLARIES AND ROBBERIES RECORDED BY POLICE, WITH PERSONS IN ADULT PRISONS PER 100,000 TOTAL POPULATION: SELECTED COUNTRIES: RECENT YEAR

	Robbery 1979	Burglary 1979	Persons in adult prisons
Canada	88.3	1,252.3	96.9
Australia	25.5	1,120.7	67.4
England-Wales	25.4	1,116.8	85.1
France	9.4	437.2	66.7
Japan	1.8		43.0
Netherlands		904.9	24.6
U.S.A.	212.1	1,423.7	207.3

TABLE 20

INCARCERATION RATE AS A PERCENTAGE OF CONVICTIONS: CANADA: 1964-1973

	Robbery	Theft
Year	Incarceration Rate	Incarceration Rate
1964	89	33
1966	85	29
1968	90	29
1970	90	23
1972	88	21
1973	87	21

TABLE 21

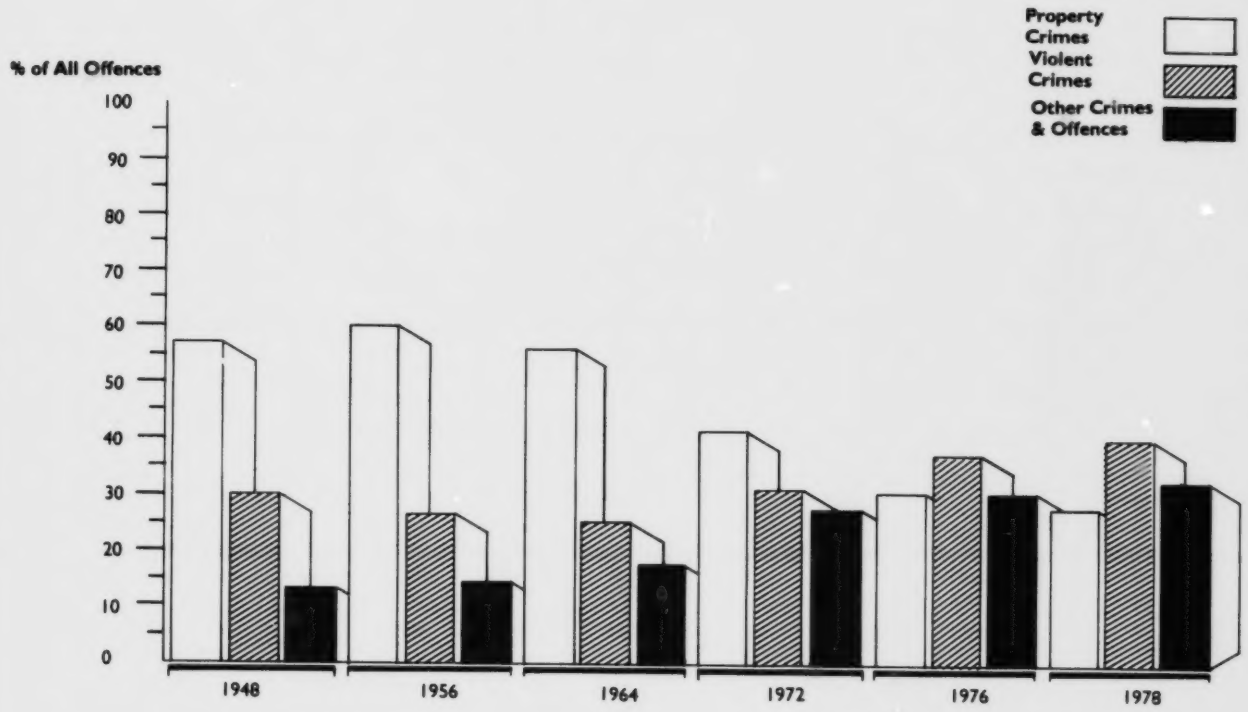
TYPE OF MAJOR OFFENCE — MALES ADMITTED TO FEDERAL PENITENTIARIES: 1948-1978

Type of Major Offence		Admissions During the Year								
		1948	1952	1956	1960	1964	1968	1972	1976	1978
Total	No.	1,547	1,806	2,363	3,332	3,816	3,433	4,162	4,408	4,663
	%	(100)	(100)	(100)	(100)	(100)	(100)	(100)	(100)	(100)
Criminal Code		1,472 (95)	1,703 (94)	2,189 (93)	3,088 (93)	3,527 (92)	3,191 (93)	3,426 (82)	3,351 (76)	3,549 (76)
Violent		459 (30)	443 (25)	603 (26)	882 (26)	962 (25)	1,009 (29)	1,288 (31)	1,671 (38)	1,865 (40)
Property		879 (57)	1,129 (63)	1,427 (60)	1,958 (59)	2,189 (57)	1,788 (52)	1,713 (41)	1,388 (31)	1,322 (28)
Other Criminal Code		134 (9)	131 (7)	159 (7)	248 (7)	376 (10)	394 (11)	425 (10)	292 (7)	362 (8)
Other Federal Statutes		75 (5)	103 (6)	174 (7)	244 (7)	289 (8)	242 (7)	736 (18)	1,056 (24)	1,113 (24)
Narcotic Control Act		57 (4)	79 (4)	115 (5)	157 (5)	100 (3)	130 (4)	304 (7)	421 (10)	431 (9)
Parole & M.S. Revocation		5 (0)	10 (1)	28 (1)	43 (1)	169 (4)	97 (3)	406 (10)	584 (13)	646 (14)

Note: As of the fiscal year (ending March 31) for 1968 and earlier. As of the calendar year (ending December 31) for 1970 and thereafter. Parole and M.S. revocation for the years 1948-1956 means violation of Tickets of Leave.

FIGURE G

TYPE OF MAJOR OFFENCE — MALES ADMITTED TO FEDERAL PENITENTIARIES: 1948-1978



IV. Criminal Justice System Expenditures and Employment

Chart H illustrates the rapid growth in public expenditures for the Canadian criminal justice system over the past two decades, although it should be borne in mind that a significant proportion of that growth is due to inflation.

Table 22 and Figure I detail criminal justice expenditures in Canada for the latest available year. The major portion of these penal justice expenditures goes to policing, a phenomenon common to Canada and the U.S.A. In Canada, for 1979/80, two billion dollars were spent on police services, of which the major portion went for police officer salaries. The average expenditure on such services per officer was $35,000 for 60,000 police officers. Nearly one billion dollars was spent on corrections. Of this total, the expenditure at the federal level on offenders in the community was less than 10 million dollars or $1,500 per offender per year.

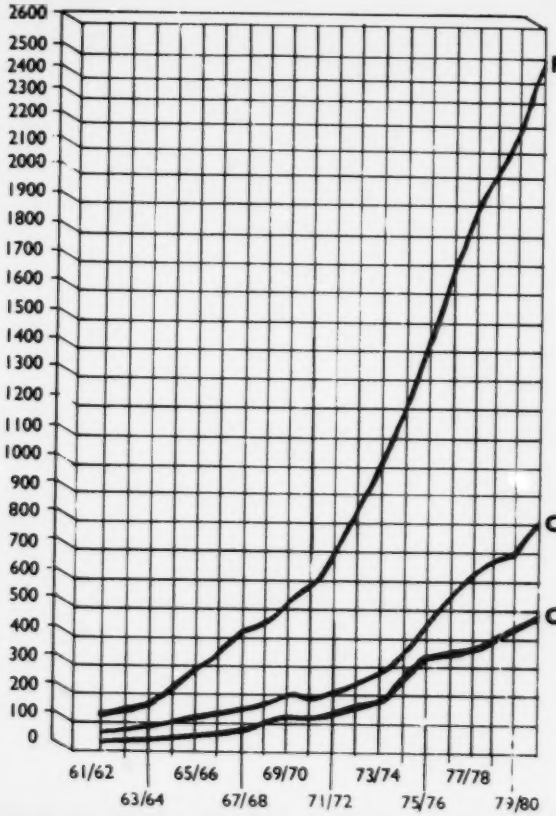
Table 23 shows that the number of persons employed in the statistical categories that encompass criminal justice has grown dramatically from 1900 to today. However, the growth has been limited to police and corrections. The rate of persons employed as judges and lawyers has not changed for Canada, although it has grown in the U.S.A., and recent years have seen a dramatic growth in the number of lawyers in Canada. Community corrections would be a negligible proportion of the total even if 1980 figures were available. There has been a substantial growth in both private security and private insurance in the last two decades in most of the countries.

Table 24 illustrates the growth in estimated police strength in Canada over the century. Table 25 shows a similar pattern of growth in the actual number of police officers for the selected countries, while also reflecting substantial variations in the number of police per capita. France appears to have nearly fifty per cent more police than Canada, while the rate in the U.S.A. is only marginally greater.

Table 26 demonstrates the fact that correctional staff in Canada grew at a faster rate than the inmate population in Canada over the past few years. Table 27 shows the relatively small proportion of correctional resources that are devoted to community-based alternatives, despite overall growth in the numbers of probation and parole officers. In Canada, offenders in the community represent two-thirds of the total under correctional control, but have only one-eighth of the staff allocated to them.

CHART H

POLICE,COURTS AND CORRECTIONAL EXPENDITURES: CANADA: 1961 TO 1980



Note: — This Chart is expressed in current dollars, not constant dollars. Inflation accounts for approximately 2/3 to 3/4 of the growth in dollar amounts.

— Police expenditures are reported in gross terms, and are therefore consistently overestimated because federal revenues from provincial and municipal contract policing by the RCMP, and provincial transfers to municipalities for policing purposes, are not subtracted from the total.

— Prior to 1971, municipal spending for police, courts and corrections was not reported in disaggregated form. After 1971, police expenditures are reported separately, and account for at least 95% of municipal spending for criminal justice. Of the remaining portion, virtually all municipal expenditures are for courts, with municipal spending for corrections occurring only in Nova Scotia.

— If a comparison were made for the period 1971/72 - 1980/81, the growth rates in expenditures for the three major components of the system would be roughly equivalent, with the police sector growing by approximately 270%, the court sector by approximately 203%, and the corrections sector by approximately 280%.

TABLE 22

AVERAGE EXPENDITURES PER PERSON FOR PENAL JUSTICE PROGRAMS: CANADA: 1977/78

Program	$Millions	%	$ Per Capita
Police	1,718	65.6	73.60
Crown Counsel	51	1.9	2.20
Criminal Legal Aid	43	1.6	1.86
Courts	248	9.5	10.61
Compensation to Victims of Crime	6	.2	.27
Adult Corrections[a]	551	21.1	23.62
TOTAL	2,617	100	112.16

a. Adult corrections is composed of "adult imprisonment" (20.3%) and "community corrections" (0.8%).

FIGURE I

AVERAGE EXPENDITURES FOR PENAL JUSTICE PROGRAMS: CANADA: 1977/78

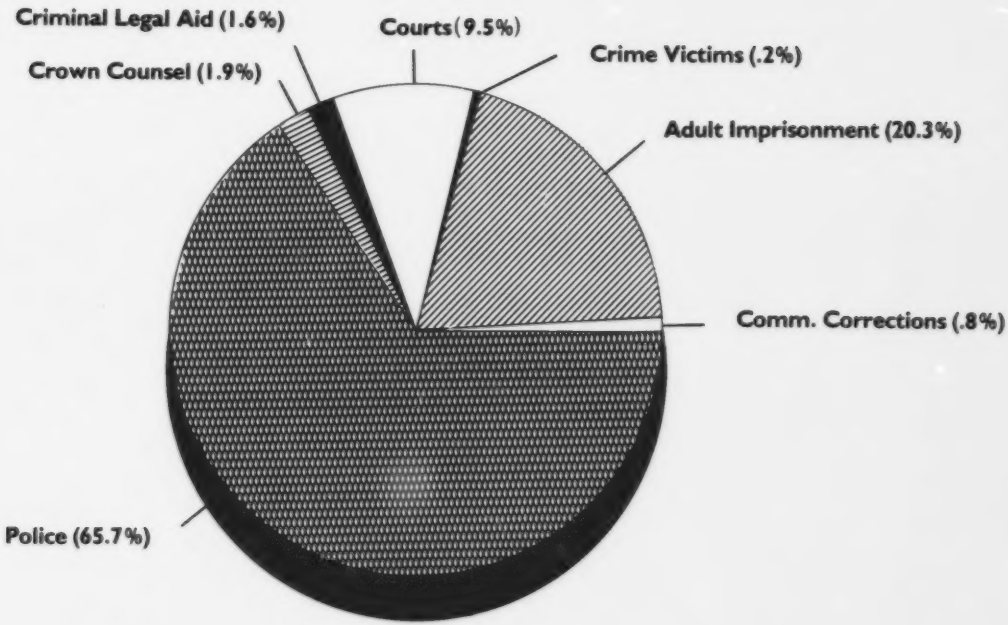


TABLE 23

PERSONS EMPLOYED AND RATES PER 100,000 POPULATION IN CRIMINAL JUSTICE ACTIVITIES: CANADA AND U.S.A.: 1900 AND 1970

CANADA					U.S.A.				
Census category	1881[a]		1971		1900		1970		Census Category
	Persons	Rate	Persons	Rate	Persons	Rate	Persons	Rate	
Policemen	1,313	30.4	41,940	194.5	32,452[b]	42.6	591,506	288.7	Policemen and detectives-government[c]
Lawyers and notaries	3,503	81.0	16,315	76.7	55,632	73.1	413,978	203.1	Lawyers and judges
Judges and magistrates	146	3.4	1,260	5.9					
Guards and caretakers	1,542	35.7	51,220	240.9	9,876[c]	39.3	497,076	243.9	Guards, watchmen and doorkeepers
Private security			36,525	169.1			397,000	195.0	Private security

Note: a. This includes Nova Scotia, New Brunswick, Prince Edward Island, Quebec, Ontario, Manitoba and British Columbia. It also includes certain territories later included in Alberta, Saskatchewan and Labrador, but excludes what is known today as the Yukon and Northwest Territories.

b. Includes marshalls, constables, sheriffs and bailiffs.

c. Estimate.

TABLE 24

ESTIMATED POLICE STRENGTH WITH RATES PER 100,000 TOTAL POPULATION: CANADA: DECADES 1901 - 1980

	Census Data[a]		R.C.M.P.[b]		Provincial[c]		Municipal Police[d]	
Year	Number	Rate	Number	Rate	Number	Rate	Number	Rate
1901	2,411	45.5	936	17.7				
1911	3,374	53.4	649	9.3				
1921	6,314	73.8	1,671	19.5				
1931	10,978	107.5	1,245	12.2			5,004	
1941	16,070	141.2	4,154	36.5			5,778	
1951	25,797	188.1	3,800	27.7	2,322		8,531	
1961	30,179	165.5	7,558[e]	42.3	2,314		15,679	
1971	38,885	180.3	11,761[e]	55.2	7,437		23,353	
1980	66,687[f]	278.8	20,289[g]	84.8	10,829[h]		35,742[h]	

Note: a. These data represent "policemen and detectives" from the Census, but exclude the Yukon and the Northwest Territories from 1901 to 1951. In 1901, the data for "Northwest and Unorganised territories" are limited to agglomerations.

b. These data are for 1900, 1910, 1920, 1930, 1940 and 1950.

c. BCPP, OPP, QPP.

d. Up to 1961, only includes major municipalities; these police were employed by areas with 3.3 million in 1930, 4.4 million in 1940 and 5.2 million in 1950.

e. From 1960, figures include all civilians and public servants. The figures used are 1960 and 1970. The equivalent figures for police officers only is 6,149 (33.5) for 1961 and 9,917 (46.0) for 1971.

f. Total numbers of police personnel from Statistics Canada; 52,986 were full-time police officers.

g. For fiscal year 1980/81, there were 12,888 uniform members, 1,506 special constables, 2,105 civilians and 3,790 public servants.

h. Total police personnel, including others of 2,180 for provincial and 6,249 for municipal.

TABLE 25

POLICE OFFICERS IN RATES PER 100,000 TOTAL POPULATION: SELECTED COUNTRIES: 1900, 1960, 1970 AND RECENT YEAR

	Year	Number	Rate
Canada	1900		
	1960[a]	26,189	143.6
	1970	40,295	189.2
	1979	52,646	222.4
Australia	1900[b]	6,571	150.5
	1960	15,262	148.5
	1970	20,321	162.5
	1979	30,989	214.9
England-Wales	1900	44,054	135.4
	1960	72,852	159.2
	1970	94,280	193.7
	1979	113,309	230.4
France	1900	37,977	98.8
	1960		
	1970		
	1979	177,493	332.6
Japan	1900		
	1960		
	1970		
	1980	211,004[c]	181.7
Netherlands	1900		
	1960		
	1970	17,587	135.7
	1979	24,333	174.0
U.S.A.	1900	32,452	42.6
	1960	303,771	168.8
	1970	449,656	221.2
	1978	581,957	266.9

Note:

The notion of police is difficult to define cross-nationally. Most countries have government agencies like the U.S. Drug Enforcement Agency or Canadian Customs which have law enforcement responsibilities, but are not usually included as police.
Police strength may include as many as 20 per cent of employees of police forces who are civilians, such as secretaries or computer programmers. Governments as well as private companies employ a large number of private security agencies for everything from airport security to doormen of buildings.
Countries like France and Holland have at least two major agencies with functions similar to police in Canada.

a. 1961
b. 1912
c. authorized strength.

TABLE 26

PENITENTIARY STAFF, INMATE POPULATIONS, AND INMATE–STAFF RATIO: CANADA: 1900/01, 1966/67 and 1978/79

	1900/01	1966/67	1978/79
Inmates (average count)	1,430	7,444	9,481
Correctional Staff	169[a]	3,714	7,993
Inmate: Staff Ratio	8.5 :1	2.0 :1	1.2 :1

Note: a. represents 'custodial staff'.

TABLE 27

EXPENDITURES AND STAFF PER OFFENDER, WITH OFFENDERS PER 100,000 TOTAL POPULATION: CANADA AND U.S.A.: RECENT YEAR

	1977 Canada	1976 U.S.A.
Combined expenditures on probation and parole	$58,937,000	$727,571,000
Probation and parole agents	2,417	36,588
Adult offenders on community supervision	57,648	1,525,705
Expenditure: offender ratio	$1,022 :1	$477 :1
Offender: agent ratio	23.9 :1	41.7 :1
Adult offenders on community supervision per 100,000 population	248	709

Note: Most recent figures for U.S.A. were for 1976. No dramatic changes occurred in the previous years on a year by year basis.

APPENDIX "C"

Data Sources

TABLE 1: Statistics Canada (annual), "Crime and Traffic Enforcement Statistics"

FIGURE A: see Table 1 (Actual Offences . . .)
Gallup National Omnibus Study, February 1982 (Public Perception . . .)

TABLE 2: Statistics Canada (1982), "Crime and Traffic Enforcement Statistics 1980"

TABLE 3: Dominion Bureau of Statistics, Canada, "Traffic Enforcement Statistics"; Statistics Canada (1982), "Crime and Traffic Enforcement Statistics 1980"

TABLE 4: Dominion Bureau of Statistics, Canada (annual 1960 to 1970), "Crime Statistics (police)"

Statistics Canada (annual 1971 to 1973), "Crime Statistics (police)"

Statistics Canada (annual 1974 to 1980), "Crime and Traffic Enforcement Statistics"

Mukherjee, Jacobsen & Walker (1981), "Source Book of Australian Criminal and Social Statistics 1900-1980"

Home Office (annual), "Criminal Statistics, England and Wales"

France (1981), "La criminalité en France en 1980"

Japan (annual), "Japan Statistical Year Book"

Netherlands (annual), "Statistical Year Book of the Netherlands"

F.B.I. Uniform Crime Reports (annual), "Crime in the United States"

TABLE 5: Dominion Bureau of Statistics, Canada (annual 1960 to 1970), "Crime Statistics (police)"

Statistics Canada (annual 1971 to 1973), "Crime Statistics (police)"

Statistics Canada (annual 1974 to 1980), "Crime and Traffic Enforcement Statistics"

Mukherjee, Jacobsen & Walker (1981), "Source Book of Australian Criminal and Social Statistics 1900-1980"

Home Office (annual), "Criminal Statistics, England and Wales"

France (1981), "La criminalité en France en 1980"

Japan (annual), "Japan Statistical Year Book"

F.B.I. Uniform Crime Reports (annual), "Crime in the United States"

TABLE 6: see Table 5

TABLE 7: Dominion Bureau of Statistics, Canada (annual 1960 to 1970), "Crime Statistics (police)"

Statistics Canada (annual 1971 to 1973), "Crime Statistics (police)"

Statistics Canada (annual 1974 to 1980), "Crime and Traffic Enforcement Statistics"

Mukherjee, Jacobsen & Walker (1981), "Source Book of Australian Criminal and Social Statistics 1900-1980"

Home Office (annual), "Criminal Statistics, England and Wales"

France (1981), "La criminalité en France en 1980"

Netherlands (annual), "Statistical Year Book of the Netherlands"

F.B.I. Uniform Crime Reports (annual), "Crime in the United States"

CHART B: Solicitor General Canada (1981), "Selected Trends in Canadian Criminal Justice"

TABLE 8: Statistics Canada (1974), "Crime and Traffic Enforcement Statistics"

Statistics Canada (1973), "Statistics of Criminal and Other Offences"

Mukherjee, Jacobsen & Walker (1981), "Source Book of Australian Criminal and Social Statistics 1900-1980"

Home Office (1980), "Criminal Statistics, England and Wales"

France (1981), "La criminalité en France en 1980"

Japan (1981), "Japan Statistical Year Book 1981"

U.S. Department of Justice (1981), "Sourcebook of Criminal Justice Statistics 1980"

FIGURE C: see Table 8

TABLE 9: Canada (annual), "Statistical Year Book of Canada" and "Canada Year Book"

Dominion Bureau of Statistics, Canada/Statistics Canada (annual), "Statistics of Criminal and Other Offences"

TABLE 10: Dominion Bureau of Statistics, Canada/Statistics Canada (annual), "Statistics of Criminal and Other Offences"

FIGURE D: see Table 10

TABLE 11: Canada (annual), "Statistical Year Book of Canada" and "Canada Year Book"

Dominion Bureau of Statistics, Canada/Statistics Canada (annual), "Statistics of Criminal and Other Offences"

Mukherjee, Jacobsen & Walker(1981), "Source Book of Australian Criminal and Social Statistics 1900-1980"

Home Office (annual), "Criminal Statistics, England and Wales"

France (annual), "Annuaire statistique de la France"

TABLE 12: Canada (annual), "Statistical Year Book of Canada" and "Canada Year Book"

TABLE 13: Canada (annual), "Statistical Year Book of Canada" and "Canada Year Book"

Dominion Bureau of Statistics, Canada/Statistics Canada (annual), "Statistics of Criminal and Other Offences"

Dominion Bureau of Statistics, Canada/Statistics Canada (annual), "Correctional Institution Statistics"

Justice Information Report (1981), "Correctional Services in Canada 1978/79 - 1979/80"

TABLE 14: Statistics Canada, "Crime and Traffic Enforcement Statistics 1978"

Justice Information Report (1981), "Correctional Services in Canada 1978/79 - 1979/80"

TABLE 15: Dominion Bureau of Statistics, Canada (1970), "Correctional Institution Statistics"

Justice Information Report (1981), "Correctional Services in Canada 1978/79 - 1979/80"

Solicitor General Canada, "Incarceration in/au Canada 1945-1980" (unpublished)

CHART E: see Table 15

TABLE 16: Canada (1900), "Statistical Year Book of Canada"

Dominion Bureau of Statistics, Canada (1960, 1970), "Correctional Institution Statistics"

Justice Information Report (1981), "Correctional Services in Canada 1978/79 - 1979/80"

Mukherjee, Jacobsen & Walker (1981), "Source Book of Australian Criminal and Social Statistics 1900-1980"

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Australian Institute of Criminology Quarterly (1981), "Reporter"

Wilkins (1965), "Social Deviance: Social Policy, Action and Research" (England-Wales)

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